No. 87-526-CSX
Status: GRANTED

Title: Bobby Felder, Petitioner
v.
Duane Casey, et al.

Docketed:
September 22, 1987

Court: Supreme Court of Wisconsin

Counsel for petitioner: Steinglass,Steven H.

Counsel for respondent: Langley,Grant F.

Entry	Date	Note	Proceedings and Orders
1	Sep 22 1987	G	Petition for writ of certiorari filed.
2	Oct 21 1987	X	Brief of respondents Duane Casey, et al. in opposition filed.
3	Oct 21 1987		DISTRIBUTED. November 6, 1987
4	Nov 9 1987		Petition GRANTED.
			**********
5	Dec 23 1987		Joint appendix filed.
6	Dec 23 1987		Brief of petitioner Bobby Felder filed.
7	Dec 28 1987		Record filed.
		*	Certified copy of original record, box, received.
8	Jan 20 1988		Brief amici curiae of California, et al. filed.
9	Jan 22 1988		Brief amicus curiae of South Dakota filed.
10	Jan 27 1988		Brief amici curiae of International City Management Association, et al. filed.
11	Jan 29 1988		Brief of respondents Duane Casey, et al. filed.
13	Feb 5 1988		SET FOR ARGUMENT, Monday, March 28, 1988. (2nd case).
12	Feb 8 1988		CIRCULATED.
14	Feb 19 1988		Application of petition for leave to file reply brief in excess of page limitation granted by Stevens, J., on February 22, 1988. Brief not to exceed 25 pages.
15	Feb 26 1988	X	Reply brief of petitioner Bobby Felder filed.
16	Mar 28 1988		ARGUED.

87- 526

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

BOBBY FELDER,
Petitioner,

v.

DUANE CASEY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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September, 1987

QUESTION PRESENTED

Whether states may condition access to their courts in actions brought under 42 U.S.C. §1983 by requiring plaintiffs to comply with state notice of claim statutes?

PARTIES

The petitioner in this Court is Bobby Felder, who was the plaintiff in the proceedings below. Respondents are Duane Casey, Patrick Eaton, Robert Farkas, Peter Pochowski, Robert Connolly, Edward Heideman, Stanley Olsen, Roger Weber, Michael Kempfer, and Gary Hoffman.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

No. _____

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PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

The Petitioner, Bobby Felder, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Wisconsin Supreme Court, entered in this proceeding on June 24, 1987.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court reversing the Court of Appeals is reported at 139 Wis.2d 614, 408 N.W.2d 19 (1987), and is reprinted at pp. A-1 to A-20 of the Appendix to this Petition.

The opinion of the Wisconsin Court of Appeals, dated April 24, 1986, is unreported but is reprinted at pp. A-21 to A-24 of the Appendix to this Petition.

JURISDICTION

The Wisconsin Supreme Court issued its opinion on June 24, 1987, reversing the decision of the Wisconsin Court of Appeals and remanding the case to the Milwaukee County Circuit Court with instructions to dismiss the action.

The jurisdiction of this Court to review the opinion and judgment of the Wisconsin Supreme Court is invoked under 28 U.S.C. §1257(3).

STATUTES INVOLVED

This case involves 42 U.S.C. §1983 (1982), which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulations, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Relevant portions of the notice of claim statute, WIS. STAT. ANN., §893.80 (West 1983 & Supp. 1986), provide:

> §893.80 Claims against governmental bodies or officers, agents or employees; notice of injury; limitation of damages and suits.
>
> (1) Except [with respect to medical malpractice claims] as provided in sub.(1m)., no action may be brought or maintained against any ... governmental subdivision or agency thereof nor against any officer, official, agent or employe of the ... subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:
>
> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the ... governmental subdivision or agency and on the officer, official, agent, or employe under s.801.11. Failure to give the requisite notice shall not bar action on the claim if the ... subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the

> delay or failure to give the requisite notice has not been prejudicial to the defendant ... subdivision or agency or to the defendant officer, official, agent or employe; and
>
> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant... subdivision or agency and the claim is disallowed. Failure of the appropriate body to disallow within 120 days after presentation is a disallowance. Notice of disallowance shall be served on the claimant... No action on a claim against any defendant... subdivision or agency nor against any defendant, officer, official, agent or employe, may be brought after 6 months from the date of service of the notice, and the notice shall contain a statement to that effect.

STATEMENT OF THE CASE

In the early evening of Independence Day, July 4, 1981, and in the presence of his wife, children, and neighbors, [A-18] Bobby Felder was stopped for questioning by Milwaukee police officers outside his home in Milwaukee, Wisconsin. The police officers were combing the neighborhood looking for an armed individual who was reported to be in the area and who was later apprehended and arrested. [A-3]

According to police reports, Felder was not cooperative and began to shout profanities, thereby attracting neighborhood attention. Felder's neighbors, however, successfully intervened and exonerated him, and the police reportedly told Felder to leave the scene and go home. Felder, allegedly, continued to be loud and abusive and reportedly pushed an officer. [A-3]

Minutes later, members of the Milwaukee Police Department Tactical Enforcement Unit arrived and proceeded to arrest Felder for disorderly conduct. At this point according to Felder and neighbors testifying at the jury trial, the police officers, including members of the Tactical Enforcement Unit, beat Felder with batons, carried him to a paddy wagon

while he was partially unconscious, and threw him through the air and into the paddy wagon. [A-3] Felder was charged with a municipal (civil) ordinance violation of disorderly conduct, but the Milwaukee City Attorney subsequently dropped the charge. [A-3; A-22]

Felder is black and all the police officers present at the scene are white. [A-3]

On April 2, 1982, less than nine months after his arrest, Felder filed this §1983 action in the Milwaukee County Circuit Court seeking compensatory and punitive damages against one known Milwaukee police officer, respondent Kempfer, and unknown officers named as John Doe. On January 4, 1983, Felder filed a First Amended Complaint renaming respondent Kempfer and adding respondent Hoffman and two additional Milwaukee police officers as defendants. On March 8, 1984, Felder filed a Second Amended Complaint renaming the four police officers already named plus an additional eleven defendants.

This action was filed under §1983[1] and alleged violations of rights secured by various amendments to the United States Constitution, including the fourth and the fourteenth, as well as state law tort and conspiracy claims. [A-4]

In each of their Answers, the defendants raised the affirmative defense of non-compliance with WIS. STAT. ANN. §893.80 (West 1983 & Supp. 1986) (hereinafter cited as "§893.80"), the notice of claim requirement. [A-4]

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[1]Felder also included a claim based on 42 U.S.C. §1985(2) (1982) in which he alleged a racially-motivated conspiracy to interfere with his access to the state courts. All the Wisconsin courts in this case have treated the §1983 and §1985(2) claims identically for purposes of the notice of claim issue, and in this Petition Felder only refers to his §1983 claims.

On March 4, 1985, this case went to trial against ten Milwaukee police officers on state and federal claims involving false arrest, the use of excessive force, false imprisonment, and conspiracy. [A-4] The case was heard before a jury and presided over by the Honorable Robert W. Landry, Circuit Court Judge for Milwaukee County.

During four days of trial, Felder and his wife testified, as did several of his neighbors who had witnessed the events in question. Plaintiff also called several police officer defendants adversely and presented medical testimony by his physician. In addition, plaintiff called as a witness Milwaukee Alderman Roy Nabors, an elected member of the City of Milwaukee Common Council, who had responded to a call from Felder's neighbors that evening and who testified about the police investigation Alderman Nabors initiated into the incident.

On March 4, 1985, prior to the start of the trial, the trial court had rendered an oral decision rejecting the defendants' motion to dismiss the action based on Felder's non-compliance with §893.80, the notice of claim statute. On March 8, 1985, after four days of trial testimony and evidence, the trial court issued a written decision consistent with its oral decision. Finally, at the close of plaintiff's case on March 8, 1985,[2] the trial court again denied defendants' mo-

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[2]In summarizing the history of the case, the Wisconsin Supreme Court stated that the trial court dismissed Felder's civil rights claims after the defense rested its case, [A-4] but that statement is erroneous. The trial court in its Amended Order for Judgment noted that it ruled on the motions at the close of plaintiff's case. [A-25]

This discrepancy, however, has no bearing on the substance of this Petition as the decision of the Wisconsin Supreme Court rests squarely on the holding that Felder was required to comply with the notice of claim statute as a condition of bringing a §1983 action in the Wisconsin courts.

tion to dismiss based on Felder's failure to comply with §893.80 with respect to his federal claims.[3]

At the March 8, 1985, hearing, however, the trial court *sua sponte* dismissed Felder's §1983 and related federal rights civil claims against the eight respondent poice officers named in the Second Amendment Complaint based on the statute of limitations.[4] With respect to the two remaining defendants, the trial court ordered the case to proceed, but Felder's councel refused after a mistrial motion was denied, and the trial court dismissed the §1983 claims against respondents Kempfer and Hoffman for failure to prosecute. [A-26]

The Amended Order for Judgment, dated May 23, 1985, rejected the defendants' argument that plaintiff's §1983 claims should be dismissed for failure to comply with §893.80, the notice of claim statute. [A-26 A-27] The trial court, however, reaffirmed its earlier decision dismissing the §1983 claims. [A-27]

Felder then successfully appealed to the Wisconsin Court of Appeals, which on April 24, 1986, unanimously reversed the decision of the trial court and held that the three-year limitations period for personal injury actions in WIS. STAT. ANN. §893.54(1) (West 1983) applied retroactively to the

[3]The trial court, however, dismissed Felder's state law claims based on non-compliance with §893.80. [A-4] The dismissal of the state law claims is no longer an issue in this case.

[4]In dismissing the §1983 claims based on the statute of limitations, the trial court initially ruled that the two-year limitations period for intentional torts in WIS. STAT. ANN. §893.57 (West 1983) was applicable. After this Court's April 17, 1985, decision in *Wilson v. Garcia*, 471 U.S. 265 (1985), the trial court ruled that the three-year limitations period for "injuries to the person" in WIS. STAT. ANN. §893.54(1) (West 1983) applied to §1983 actions in Wisconsin but only prospectively. Thus, it reaffirmed its earlier decision dismissing Felder's §1983 claims based on the statute of limitations. [A-27]

present §1983 case. The defendants cross-appealed, arguing that Felder's claims "are barred by his failure to comply with the notice of claim statute §893.80" and by *Parratt v. Taylor*, 451 U.S. 527 (1981). [A-23] The Wisconsin Court of Appeals, however, rejected the cross-appeal and summarily reversed those portions of the judgment dismissing Felder's federal civil rights claims against the eight respondents who had been brought into the case by the Second Amended Complaint. [A-24]

The Wisconsin Supreme Court granted review in a petition filed by the ten respondent Milwaukee police officers. The court also granted Felder's cross-petition, which was based on the uncertainty of the disposition of his §1983 claims against the two police officers against whom his action was timely. [A-5]

On June 24, 1987, the Wisconsin Supreme Court by a four-three vote reversed the decision of the Wisconsin Court of Appeals and remanded the action to the trial court with instructions to dismiss the action. The court did *not* address either the statute of limitations or the applicability of *Parratt*, but rather disposed of Felders's §1983 claims against all ten respondents solely because of Felder's failure to comply with the notice of claim requirement in §893.80.

Initially, the Wisconsin Supreme Court concluded that as a matter of state law the notice of claim requirement applied to §1983 actions filed in the Wisconsin courts. [A-9] The court then rejected Felder's federal supremacy argument and held that "failure to comply with §893.80, Stats., bars a litigant who is pressing a federal civil rights claim from proceeding with that claim in state court." [A-12]

In concluding that Wisconsin courts could apply the notice of claim statute to §1983 actions, the Wisconsin Supreme Court relied heavily on its decision in *Kramer v. Horton*, 128 Wis.2d 404, 383 N.W.2d

54, *cert. denied*, 107 S.Ct. 324 (1986), in which it had held that the tenth amendment permitted states to require plaintiffs to exhaust administrative remedies as a condition of bringing §1983 actions in state courts. [A-11—A-12]

> While the Constitution vests in Congress "the power to prescribe the basic procedural scheme under which claims may be heard in federal courts,"... it reserves to the state legislatures and state courts the power to prescribe the procedural scheme under which claims may be heard in state court. [A-11 A-12](quoting *Kramer*, 128 Wis.2d at 417, 383 N.W.2d at 59)

The court then characterized the notice of claim statute as "procedural" and stated:

> that litigants who choose to press their claims in state court cannot "elect" to ignore state procedural rules. The right to sue in state court is accompanied by the corollary duty to abide by certain rules and procedures. Section 893.80 is an example of just such a procedure. [A-12]

In reaching this decision, the Wisconsin Supreme Court explicitly acknowledged the existence of federal court decisions refusing to apply state notice of claim statutes to §1983 litigation, including not only a case from the lower federal courts in Wisconsin, *see Perrote v. Percy*, 452 F.Supp. 604 (E.D. Wis. 1978), but also decisions from the Ninth, Tenth, and District of Columbia Circuits. *See Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970); *Willis v. Reddin*, 418 F.2d 702 (9th Cir. 1969); *Rosa v. Cantrell*, 705 F.2d 1208 (10th Cir. 1982), *cert. denied*, 464 U.S. 821 (1983); *Brown v. United States*, 742 F.2d 1498 (D.C. Cir. 1984)(en banc), *cert. denied*. 471 U. S. 1073 (1985). Nonetheless, the Wisconsin Supreme Court found these federal court decisions inapplicable because the present case involved whether the notice of claim statute could be applied to §1983 claims brought in *state* courts. [A-11]

In upholding the application of the notice of claim statute to §1983 actions, the Wisconsin

Supreme Court noted that the requirement does not preclude all possibility for recovery based on violations of federal law. "The plaintiff remains free, of course, to litigate the civil rights claims in federal court." [A-12]

In addition, the Wisconsin Supreme Court addressed whether the failure of the plaintiff to give statutory notice within the 120-day period contained in §893.80(1)(a) could be excused since, under Wisconsin law, such failures are not fatal if the city had "actual notice" of the claim and the plaintiff could show that the failure to give notice was not prejudicial. [A-12—A-13]

Without reaching whether the absence of statutory notice was prejudicial, [A-14] the court held that neither the intervention of a Milwaukee alderman within hours of the arrest (and his subsequent written communication) nor the investigations by the city met the "actual notice" requirement of the statute. [A-12—A-14]

In discussing this issue, the Wisconsin Supreme Court described the "notice" that was given.

> It is conceded that a police investigation into Felder's arrest was underway shortly after its occurrence. The record contains several police reports, each of which was individually prepared by the various officers who were present during the arrest or who directly participated in it. The police captain in charge of the district in which the arrest occurred was made aware of the arrest and of the various police reports. The record also reflects that Alderman Nabors contacted then police chief Harold Breier, by letter, to personally inform him of the Felder incident. [A-13]

Nonetheless, the court held that the "notice" given did not meet the "actual notice standard" of its earlier decisions under which "documents" constituting "adequate notice" had usually, at a minimum, cited the facts giving rise to the injury

and indicated an intent on the plaintiff's part to hold the city responsible. [A-14] Thus, neither the communication from the alderman nor via the police reports was sufficient.

Therefore, the Wisconsin Supreme Court held that the failure to comply with §893.80 by providing either statutory or actual notice precluded Felder from proceeding futher with his §1983 action in state court. The court then reversed the decision of the Wisconsin Court of Appeals and remanded to the trial court with instructions to dismiss Felder's action.

Three justices of the Wisconsin Supreme Court dissented.

Justice Shirley S. Abrahamson, joined by Chief Justice Nathan S. Heffernan, concluded that §893.80 was inapplicable to §1983 actions. First, they looked to the legislative history of §893.80, which was adopted to restore partially governmental immunity after its abrogation in *Holytz v. Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962), and concluded that the Wisconsin legislature did not intend that §893.80 apply to §1983 actions. [A-17] Second, they concluded that the application of §893.80 to §1983 actions was inconsistent with controlling principles of federal law. [A-17]

In a separate dissenting opinion, Justice William A. Bablitch characterized the notice of claim statute as a "subtlety of state procedural law that must give way to the vindication of federal rights in state courts." [A-19] He also looked to the purpose of the notice of claim statute of avoiding prejudice to governmental units by the late filing of claims and concluded that the notice given in the present case permitted a prompt investigation that "more than fulfilled" the purpose of the statute. [A-20]

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE WISCONSIN SUPREME COURT CONFLICTS DIRECTLY WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT.

The decision of the Wisconsin Supreme Court requiring compliance with §893.80, the notice of claim statute, as a condition of pursuing §1983 actions in the Wisconsin courts is in direct conflict with decisions of state courts of last resort in California, Idaho, and Oklahoma. In each of these states, the state supreme court has held that as a matter of federal law, plaintiffs in state court §1983 actions need not comply with notice of claim statutes.

In *Williams v. Horvath*, 16 Cal.3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976), Justice Mosk, writing for a unanimous court, noted the close relationship between the 100-day California notice of claim requirement and the legislative restoration of governmental immunity[5] and rejected application of the notice of claim requirement to state court §1983 actions. "[T]he purpose of underlying section 1983 ... may not be frustrated by state substantive limitations couched in procedural language." 16 Cal. 3d at 841, 584 P. 2d at 1129-30, 129 Cal. Rptr. at 457-58.

In *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888, 892 (1982), the Idaho Supreme Court held that the 120-day notice of claim requirement for suits against state officials was inapplicable to §1983 actions.

In *Willborn v. City of Tulsa*, 721 P.2d 803 (Okla. 1986), the Oklahoma Supreme Court addressed the

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[5]The Wisconsin notice of claim statute, §893.80, like the California Tort Claims Act, was enacted in response to the judicial abrogation of governmental immunity. *See* A-17 (Abrahamson, J., dissenting). *See also* Legislative Council Report on §893.80 (1976) *reprinted in* WIS. STAT. ANN. §893.80 (West 1983).

duty of the Oklahoma courts to entertain §1983 claims when parallel state remedies were barred by the six-month notice of claim requirement of the Political Subdivision Tort Claims Act. After applying the notice of claim requirement to the state remedies, the court observed that "the remedy provided by §1983 must be independently enforceable even if a parallel state remedy is available" and held that §1983 actions must be heard in state courts even if the state remedy is barred. *Id.* at 805.

In addition to these decisions of state courts of last resort, intermediate appellate courts in Colorado, New Jersey, and Texas have refused to apply notice of claim requirements to state court §1983 actions on federal grounds. *See Mucci v. Falcon School District*, 655 P.2d 422, 423 (Colo. Ct. App. 1982) (rejecting application of 90-day Colorado notice of claim requirement to §1983 actions); *Fuchilla v. Layman*, 210 N.J. Super. 574, 510 A.2d 281, 285-86 (App. Div. 1986) (rejecting application of 90-day notice of claim requirement of New Jersey Tort Claims Act to §1983 actions); *Spencer v. City of Seagoville*, 700 S.W.2d 953, 955-56 (Tex. Ct. App. 1985) (rejecting application of Texas Tort Claims Act notice of claim requirement to §1983 action because of unavailability of other remedies).

Other state courts, however, have applied notice of claim requirements to state court §1983 actions. In *423 South Salina Street v. City of Syracuse*, 68 N.Y.2d 474, 503 N.E.2d 63, 410 N.Y.S.2d 507 (1986), *appeal dismissed*, 107 S.Ct. 1880 (1987), the New York Court of Appeals applied a notice of claim provision of the New York statutes to §1983 actions.[6] Similarly, in *Clark v. Indiana Department of Public Welfare*, 478 N.E.2d 699 (Ind. Ct. App. 1985), *cert. denied*, 106 S.Ct. 2893 (1986), the Indiana Court of Appeals held that the state tort claims act notice provision is a "procedural precondition to sue" that "overrides the procedural framework of §1983 when the litigant chooses a state court forum." 478 N.E.2d at 702.

[6]This is consistent with an earlier decison in which the New York Court of Appeals applied a similar notice of claim requirement to a state court action under 42 U.S.C. §1981. *See Mills v. County of Monroe*, 59 N.Y.2d 307, 451 N.E.2d 456, 464 N.Y.S.2d 486, *cert. denied*, 464 U.S. 1018 (1983).

The split among state courts of last resort on this issue is deep and irreconcilable and will not be resolved by the state courts themselves.

Nor will resolution of this conflict come from the federal courts, which have nearly unanimously rejected the application of notice of claim requirements to §1983 actions.[7] In fact, each of the state appellate courts that require compliance with notice of claim statute in §1983 litigation, including the Wisconsin Supreme Court in this case, has acknowledged the existence of federal court cases refusing to apply notice of claim requirements to §1983 litigation but has rejected those cases or treated the decisions as not being applicable to §1983 cases filed in state courts.

Therefore, this conflict among state courts of last resort on the application of notice of claim requirements to state court §1983 litigation will only be resolved if this Court reviews a state court §1983 case. Only such a case will give this Court the opportunity to address directly whether states may require compliance with notice of claim statutes as a condition of pursing §1983 claims in state courts.[8]

[7]The Second, Fifth, Ninth, Tenth, Eleventh, and District of Columbia Circuits reject the application of notice of claim requirements to §1983 actions, while the Third Circuit has upheld the application of a notice of claim requirement in a §1983 case arising in a territory. *See infra* Part II.

[8]The experience in the state courts on the closely related §1983 exhaustion of administrative remedies issue since *Patsy v. Board of Regents of the State of Fla.*, 457 U.S. 496 (1982), *see* Part III, *infra*, strongly suggests that only this Court's review of a §1983 notice of claim decision from a state court will resolve definitively whether *state* courts that entertain §1983 actions must disregard state notice of claim requirements.

II. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE WISCONSIN SUPREME COURT CONFLICTS WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS AND RAISES IMPORTANT ISSUES IMPLICATING ESTABLISHED PRINCIPLES OF FEDERALISM.

The decision of the Wisconsin Supreme Court conflicts with decisions of the Courts of Appeals of the Second, Fifth, Ninth, Tenth, Eleventh and District of Columbia Circuits, all of which have rejected the application of state notice of claim requirements to §1983 litigation. *See Brandon v. Board of Education of the Guilderland Central School District*, 635 F.2d 971, 973 n.2 (2d Cir. 1980) (rejecting application of New York's three-month notice of verified complaint requirement for commencing non-tort suits against school districts); *Ehlers v. City of Decatur*, 614 F.2d 54, 56 (5th Cir. 1980) (rejecting application of Georgia's ante-litem notice statute requiring written notice of claim to be presented to a municipality within six months of the events on which a claim is based); *Willis v Reddin*, 418 F.2d 702 (9th Cir. 1969) (rejecting application of California 100-day notice of claim requirement); *Donovan v. Reinbold*, 433 F.2d 738, 741 (9th Cir. 1970) (same); *Rosa v. Cantrell*, 705 F.2d 1208, 1221 (10th Cir. 1982) (rejecting application of Wyoming notice of claim requirement), *cert. denied*, 464 U.S. 821 (1983); *Majette v. O'Connor*, 811 F.2d 1416, 1418 (11th Cir. 1987) (rejecting application of Florida three-year notice of claim requirement). *Cf. Brown v. United States*, 742 F.2d 1498, 1500 & n.2 (D.C. Cir. 1984) (en banc) (rejecting application of District of Columbia six-month notice of claim requirement to "constitutional tort" claims, including *Bivens* and §1983 actions), *cert. denied*, 471 U.S. 1073 (1985). *But see Deary v. Three Un-Named Police Officers*, 746 F.2d 185, 189 n.2 & 193 (3d Cir. 1984) (failure to comply with the notice of

claim requirement of the Virgin Islands Tort Claims Act bars §1983 claim against the Virgin Islands).[9]

Although the Wisconsin Supreme Court acknowledged this line of federal court cases rejecting notice of claim requirements in §1983 litigation, it treated the applicability of these cases to §1983 actions as "arguably minimal if not nonexistent."[A-11]

The decision of the Wisconsin Supreme Court, if permitted to stand, encourages the adoption by state courts of policies inhospitable to plaintiffs who prefer to litigate their §1983 claims in state courts. In interpreting §1983 more narrowly than federal courts, the Wisconsin Supreme Court effectively requires many plaintiffs with §1983 claims to select federal courts. When §1983 claimants in Wisconsin, for whatever reasons,[10] do not file notices of claim

[9]Virtually all the district courts that have addressed this issue have also rejected the application of notice of claim requirements to §1983 actions. *See, e.g., Chacon v. Zahorka*, 662 F.Supp. 90 (D. Colo. 1987)(rejecting application of Colorado notice of claim requirement); *Tryon v. Avarra Valley Fire District*, 659 F.Supp. 283, 284-85 (D. Ariz. 1986) (rejecting application of Arizona notice of claim statute); *Craig v. Witucki*, 624 F.Supp. 558, 559-60 (N.D. Ind. 1986) (rejecting application of 180-day Indiana notice of claim requirement in suits against municipal employees); *Meding v. Hurd*, 607 F.Supp. 1088, 1102-03 (D. Del. 1985) (rejecting application of Town Charter requirement that notice be served on mayor within 90 days of injury); *Williams v. Allen*, 616 F.Supp. 653, 656-59 (E.D. N.Y. 1985) (rejecting application of New York notice of claim requirement); *Burroughs v. Holiday Inn*, 621 F.Supp. 351, 353-55 (W.D. N.Y. 1985) (rejecting application of New York notice of claim requirement in actions against municipalities); *Skrapits v. Skala*, 314 F.Supp. 511 (N.D. Ill. 1970) (rejecting application of Illinois six-month notice of claim provision). *But see Cardo v. Lakeland Central School District*, 592 F.Supp. 765, 772-73 (S.D. N.Y. 1984) (applying New York notice of claim requirement.).

[10]At the time plaintiff filed his Second Amended Complaint in March, 1984, no state or federal court had rendered a reported decision requiring compliance with a state notice of claim statute in §1983 litigation. Moreover, the state and federal courts in Wisconsin had explicitly rejected the use of notice of claim requirements in §1983 actions. *See Perrote v. Percy*, 452 F.Supp. 604, 605 (E.D. Wis. 1978); *Mathias v. City of Milwaukee Depart-*

within 120 days of the incident, such litigants will have little choice other than filing their §1983 claims in federal courts.[11]

In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court held that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, was applicable in state court §1983 litigation. Justice Brennan, writing for the majority, noted that "[i]f fees were not available in state courts, federalism concerns would be raised because most plaintiffs would have no choice but to bring their complaints concerning state actions to federal courts." *Id.* at 11 n.12. Similarly, if states were permitted to impose conditions to litigating §1983 cases in state courts that do not apply in federal courts, serious federalism concerns would be raised because plaintiffs who could no longer comply with state notice of claim requirements would have no choice but to litigate their §1983 claims in federal courts.[12]

ment of City Development, 377 F.Supp. 497, 500 (E.D. Wis. 1974); *Doe v. Ellis*, 103 Wis.2d 581, 309 N.W.2d 375 (Ct. App. 1981).

Although the Seventh Circuit had not directly addressed the notice of claim issue, in *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974), Justice (then Judge) Stevens rejected the application of the Illinois Tort Immunity Act, ILL. REV. STAT. Ch. 85, §§1-101 *et seq.* (1969), which contained a notice of claim requirement, *see* Ch. 85, §8-102, *repealed by* Pub. Act 84-1431, art.1, §3 (1986), to §1983 litigaion in federal courts as a matter of federal law. *See also Luker v. Nelson*, 341 F.Supp. 111, 116-19 (N.D. I11. 1972) (notice of claim rejected as a matter of state law).

[11]Plaintiffs who do not file notices of claim within the 120-day statutory period may nonetheless comply with §898.80 if the defendants have "actual notice" of the claim and the plaintiffs meet the burden of showing that defendants were not prejudiced. [A-12—A-13] Nonetheless, after the expiration of the 120-day period, few plaintiffs with §1983 claims will risk the uncertainty of filing their § 1983 actions in the Wisconsin state courts.

[12]In addition, plaintiffs to whom the federal courts are closed because of limitations on the power of federal courts, *see, e.g., Green v. Mansour*, 474 U.S. 64 (1986) (eleventh amendment); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) (comity), would have no available forum to litigate §1983 claims if they failed to comply with state notice of claim statutes.

Most §1983 litigation has taken place in federal courts since this Court's decison in *Monroe v. Pape*, 365 U.S. 167 (1961), began the modern era of §1983 litgation, but members of this Court have commented on the increase in §1983 litigation since *Monroe* and the resulting impact on federal court caseloads. *See, e.g., Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 533 n.20 (1982) (Powell, J., dissenting); *Parratt v. Taylor*, 451 U.S. 527, 554 n.13 (1981) (Powell, J., concurring). In recent years, however, an increasing number of litigants with §1983 claims have filed their federal actions in state courts and an important state court §1983 practice has begun to develop.[13] The application of notice of claim statutes to state but not federal court §1983 litigation, however, wi'l have the inevitable result of arresting this development.

This issue, of course, involves more than federal court caseloads but more importantly goes to the role of state courts in our system of judicial federalism. For state courts to play their proper role in enforcing federal rights, litigants with a choice of forums should not be discouraged from filing §1983 claims in state courts. The Oklahoma Supreme Court recognized this facet of federalism in *Willborn v. City of Tulsa*, 721 P.2d 803 (Okla. 1986), when it refused to exclude from the Oklahoma courts §1983 claims brought by plaintiffs who had not complied with the notice of claim requirement.

> Consistent with our system of judicial federalism, which provides litigants with a double-barreled system of judicial protection, the remedy provided by §1983 may be available even if the state remedy is barred by the statute of limita-

[13]*See* Steinglass, *The Emerging State Court §1983 Action: A Procedural Review*, 38 U. Miami L. Rev. 381 (1984). There are no available statistics on the volume of §1983 litigation in state trial courts, but the increase in reported state appellate court opinions suggests the emergence of a significant state court §1983 practice. *See id.* at 434-35 & nn. 266 & 269.

tions under the Political Subdivision Tort Claims Act. *Id.* at 805 (footnote omitted).

By requiring plaintiffs in state court §1983 litigation to comply with the notice of claim statute, the Wisconsin Supreme Court departed from these basic principles, and it is therefore important that this Court review tnis case to determine whether state courts may erect barriers that force §1983 litigation into the federal courts.

III. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE WISCONSIN SUPREME COURT CONFLICTS WITH DECISIONS OF THIS COURT REQUIRING STATE COURTS THAT ENTERTAIN FEDERALLY-CREATED ACTIONS, INCLUDING §1983 ACTIONS, TO APPLY THE ENTIRE FEDERAL CAUSE OF ACTION WITH ALL ITS REMEDIAL ATTRIBUTES.

This Court has expressly reserved the issue of whether state courts are obligated to entertain §1983 actions,[14] but it has addressed the proper approach for state courts to take when entertaining federally-created actions. The decision of the Wisconsin Supreme Court, however, conflicts with decisions of this Court requiring state courts that entertain federally-created actions, including §1983 actions, to apply the entire federal cause of action with all its remedial attributes.

In the present case, the Wisconsin Supreme Court described the state notice of claim requirement as procedural and held that §1983 "litigants who choose to press their claims in state court cannot 'elect' to ignore [state] procedural rules."[15] [A-12]

[14] *See Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980); *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980).

[15] In reaching this conclusion, the Wisconsin Supreme Court expressly relied on the tenth amendment, which it held barred Congress from "'prescrib[ing] the procedural scheme under which [federal] claims may be heard in state court.'" [A- 12] In taking this position, the court relied on *Kramer v. Horton*, 128 Wis.2d 404, 383 N.W.2d 54, *cert. denied*, 107 S.Ct. 324 (1986), its §1983 exhaustion case. However, neither *Kramer* nor the present case discuss or even cite *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), or any of this Court's tenth amendment cases. Although this Court has not directly addressed whether (or the extent to which) the tenth amendment prohibits Congress from regulating "procedural" attributes of §1983 actions in state courts, the Wisconsin Supreme Court's conclusion that the tenth amendment reserves to the states the power to require the use of state policies to govern state court litigation of federal actions is inconsistent with the assumption of many decisions of this Court requiring federal remedial policies to be followed by state courts. *See, e.g., Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952) (trial by jury); *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949) (pleading requirements); *Central Vt. Ry. v. White*, 238 U.S. 507 (1915) (burden of proof). *See generally* Hill, *Substance and Procedure in State FELA Actions – The Converse Of The Erie Problem?*, 17 Ohio St. L. J. 384 (1956).

The characterization of the notice of claim requirement as procedural by the Wisconsin Supreme Court, however, does not support the use of state policies that limit access to state courts by litigants with federal causes of action, and this Court has required state courts entertaining federal causes of action, including §1983 actions, to refrain from imposing state policies that burden the litigation of federal claims or conflict with the federal definition of the cause of action.

In *Davis v. Wechsler*, 263 U.S. 22 (1923), a personal injury suit against a railroad under federal control during World War I, this Court ruled that the state practice with respect to the waiver of a venue defense could not defeat the assertion of the federal right, noting that "whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to

be defeated under the name of local practice." *Id.* at 24.

Similarly, in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), an action under the federal Merchant Marine Act, this Court rejected the characterization of a state policy as procedural and required the state courts to follow federal policies. *Garrett* involved the burden of proof on the validity of releases of liability, and this Court rejected the application of a state policy that imposed the burden on plaintiffs because it altered rights established under federal law, which placed the burden on the ship owner. The fact that the state had voluntarily opened its courts to the federal cause of action was enough to require it to give the plaintiff "the benefit of the full scope of these [federally-created] rights." Moreover, the characterization of the state rule as procedural did not give the state courts authority to reject a policy that "inhered" in the cause of action. *Id.* at 249.

Finally, in *Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949), this Court indicated its willingness to reject state practices that unnecessarily burdened rights arising under federal law. In *Brown*, a strict state pleading rule resulted in the dismissal of the plaintiff's FELA complaint. This Court granted certiorari "because the implications of the dismissal were considered important to a correct and uniform application of the federal act in the state and federal courts." *Id.* at 295. Noting that "this federal right cannot be defeated by the forms of local practice," this Court reversed the dismissal. *Id.*

This Court has also specifically rejected the application of notice of claim requirements to federally-created actions. In *El Paso & Northeastern Railway Co. v. Gutierrez*, 215 U.S. 87 (1909), a widow filed a claim against a railroad in state court under the Federal Employers' Liability Act of 1906 for

damages arising out of the death of her husband. The railroad's sole defense was that the plaintiff had failed to comply with a territorial notice of claim statute. Relying on the principle that "an act of Congress undertaking to regulate commerce in the District of Columbia and territories of the United States would necessarily supersede the territorial law regulating the same subject," *id.* at 93, this Court held that the widow's failure to comply with the notice of claim requirement did not bar her from litigating her federal claims in state court.

The decision of the Wisconsin Supreme Court in this case is in direct conflict with this Court's approach to notice of claim requirements in *Gutierrez*.

This Court has also applied the approach developed in *Davis*, *Garrett*, *Brown*, and *Gutierrez* to §1983 actions arising in state courts. Although this Court has not addressed the precise issue of the obligation of state courts to entertain §1983 actions without regard to state notice of claim statutes, it has required state courts to first define the scope of the §1983 action and to then apply all the policies that are part of the federally-defined cause of action.

In *Martinez v. California*, 444 U.S. 277 (1980), this Court refused to allow a state immunity statute to be used as a defense to a §1983 claim, even though the action was being litigated in state court. In rejecting the application of the state-created immunity, this Court made clear that federal law is controlling.

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. §1983 ... cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced ... The immunity claim raises a question of federal law.
>
> *Id.* at 284 n.8 (quoting *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974)).

In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court again took the opportunity to make clear that the policies generally applicable to §1983 were also applicable when §1983 claims were brought in state courts. In *Thiboutot*, this Court held that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, applied equally to federal and state court litigation, despite the fact that the Fees Act does not expressly authorize state courts to award fees. In reaching this conclusion, the Court relied on the Fees Act and its legislative history, including the characterization of the fee provision as an "integral" part of the §1983 remedy. *Id.* at 11.

The present case also raises important issues as to the proper approach by state courts to §1983 actions beyond notice of claim statutes. Many state courts are reluctant to abandon familiar state policies when entertaining §1983 actions. For example, in the present case, the Wisconsin Supreme Court relied on *Kramer*, in which it limited *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982), to federal court and required the exhaustion of administrative remedies in state court §1983 litigation.[16] Such a narrow reading of *Patsy*, however, has been described by Justice White as "questionable," *see Caylor v. City of Red Bluff*, 106 S.Ct. 605 (1985) (White, J., dissenting), *denying cert.*

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[16]*Accord Bartschi v. Chico Community Memorial Hosp.*, 137 Cal. App.3d 502, 187 Cal. Rptr. 61 (1982) (*Patsy* inapplicable in state courts); *State ex rel. Barsham v. Indiana Medical Licensing Bd.*, 451 N.E. 2d 691 (Ind. Ct. App. 1983) (same); *McConnell v. City of Seattle*, 44 Wash. App. 316, 722 P.2d 121 (same), *review denied*, 107 Wash. 2d 1007 (1986). *But see Fetterman v. University of Conn.*, 192 Conn. 539, 473 A.2d 1176 (1984) (holding *Patsy* applicable to state court §1983 litigation); *O'Connors v. Helfgott*, 481 A.2d 388 (R.I. 1984) (same); *Logan v. Southern Cal. Rapid Transit Dist.*, 136 Cal. App.3d 116, 185 Cal. Rptr. 878 (1983) (same); *Maryland Nat'l Capital Park & Planning Comm'n v. Crawford*, 59 Md. App. 276, 475 A.2d 494 (1984) (same), *aff'd on other grounds*, 307 Md. 1, 511 A.2d 1079 (1986).

to No. 3 Civ. 21263 (Cal. Ct. App. March 26, 1985), and reflects a basic misunderstanding of this Court's role in defining federal causes of action that may be litigated in both state and federal courts.

The initial questions that state and federal courts entertaining §1983 actions must address involve the scope of the §1983 cause of action. When federal courts define §1983 but find a gap or a deficiency in federal law, they are directed by the civil rights choice of law statute, 42 U.S.C. §1988, to look to state law for the appropriate policy.[17]

When state courts entertain §1983 actions, however, there is an issue as to whether they may use their otherwise applicable state policies. Nonetheless, state courts must also go through the same process of defining the scope of the §1983 cause of action. It is this threshold issue that state courts often overlook while rushing to decide whether state policies are inconsistent with the purposes of §1983 or burden §1983 litigation. Such questions, however, should only be asked *after* a state court has defined the scope of §1983 and required compliance with a state policy.

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[17]*See Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984) (describing three-step borrowing process under §1988). Federal courts that have followed this approach to the application of notice of claim requirements to §1983 litigation have found federal law not to be deficient and thus have not had any need to look to state law. *See, e.g., Brown v. United States*, 742 F.2d 1498, 1504-07 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1073 (1985); *Burroughs v. Holiday Inn*, 621 F.Supp. 351, 354 (W.D.N.Y. 1985); *Williams v. Allen*, 616 F.Supp. 653 (E.D. N.Y. 1985). Even if a federal court found the absence of a notice of claim provision to be a "deficiency" in federal law, the federal court would only be required to borrow the state policy if the policy was appropriate in light of the purposes of §1983. *See Burnett*, 468 U.S. at 52-53. Moreover, a borrowed state policy can also be rejected under the inconsistency clause of §1988. *Id.* at 53 n.15.

By failing to first define the scope of the federally-created §1983 cause of action, the Wisconsin Supreme Court departed from the approach this Court has followed in construing federally-created actions, including actions authorized by §1983.

IV. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE WISCONSIN SUPREME COURT CONFLICTS WITH PRINCIPLES DEVELOPED BY THIS COURT IN CONSTRUING §1983.

The decision of the Wisconsin Supreme Court requiring compliance with §893.80, the notice of claim statute, is inconsistent with principles developed by this Court in construing §1983.

In *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982), this Court held that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to §1983." *Id.* at 516. In construing §1983 to guarantee immediate access to judicial forums, the *Patsy* Court did not expressly nor implicitly limit its construction of §1983 to cases filed in federal court.

In finding the notice of claim statute applicable to §1983 actions, the Wisconsin Supreme Court stated, "that the primary purpose of a notice of claim statute is to give the municipality the opportunity to attempt to compromise the claim and effect settlement before the parties are forced to proceed with a lengthy or costly lawsuit."[18] [A-9] Although the

[18]The Wisconsin notice of claim requirement is applicable to any cause of action, including injunction actions. *See* App. 9a n.3, and *Figgs v. City of Milwaukee*, 121 Wis.2d 44, 52, 357 N.W.2d 548, 553 (1984).

Under the notice of claim statute, claimants who file a statutory notice may not commence a civil proceeding until the

notice of claim statute, unlike an exhaustion of administrative remedies requirement, does not provide claimants with administrative hearings, the application of the notice of claim statute to §1983 litigation denies plaintiffs the immediate access to judicial forums that the *Patsy* Court construed §1983 as guaranteeing.

The use of the Wisconsin 120-day notice of claim requirement in state court §1983 litigation is also inconsistent with this Court's approach to the selection of the appropriate statute of limitations in §1983 litigation. In *Wilson v. Garcia*, 471 U.S. 261 (1985), this Court required the use of the limitations period for personal actions and specifically rejected the borrowing of a limitations period for wrongs committed by public officials. *Id.* at 279. Although the notice of claim statute does not require the commencement of litigation within 120 days of the event giving rise to the claim, it requires §1983 litigants to take significant steps within the 120-day period, including the filing of a statutory notice that not only recites the facts giving rise to the injuries but also indicates an intent to hold the city responsible for the resulting damages. [A-14]

Such short limitation periods also fail to give §1983 plaintiffs adequate time to prepare civil rights litigation, *see Burnett v. Grattan*, 468 U.S 42, 50-51 (1984), and are inconsistent with this Court's purpose in *Wilson* of selecting the neutral limitations period for personal actions to assure that states would not intentionally or otherwise discriminate against §1983 claims. *See Wilson*, 471 U.S. at 279.

claim is disallowed or 120 days elapse. §893.80(1) (b). After that time period, they have six months to commence a civil action. *Id.* The Wisconsin Supreme Court in the present case did not address whether either this waiting period or statute of limitations applied to state court §1983 actions.

The use of notice of claim requirements derived from state tort claims acts is also inconsistent with this Court's approach to §1983 immunity issues, which this Court has consistently treated as matters of federal law. *See, e.g., Owen v. City of Independence*, 445 U.S. 622 (1980); *Martinez v. California*, 444 U.S. 277 (1980); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

The Wisconsin notice of claim requirement is part and parcel of the statute that re-introduced governmental immunity in Wisconsin following its abrogation by the Wisconsin Supreme Court in *Holytz v. Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962).[19] *See* A-17 (Abrahamson, J., dissenting). By applying this notice of claim requirement to §1983 litigation, the Wisconsin Supreme Court departed from principles established by this Court and denied access to state judicial forums to §1983 plaintiffs.

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[19]State and federal courts that have traced notice of claim requirements to state immunity doctrines have rejected their applicability to §1983 litigation. *See, e.g., Brown v. United States*, 742 F.2d 1498, 1508-09 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1073 (1985); *Donovan v. Reinbold*, 433 F.2d 738, 741 (9th Cir. 1970); *Williams v. Horvath*, 16 Cal.3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976).

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Wisconsin Supreme Court.

Respectfully submitted,

September, 1987

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APPENDIX

No. 85-1344

STATE OF WISCONSIN

IN SUPREME COURT

Bobby Felder,
Plaintiff-Appelant and
Cross-Respondent and Cross-Petitioner,

v.

Duane Casey, Patrick Eaton,
Robert Farkas, Peter Pochowski,
Robert Connolly, Edward Heideman,
Stanley Olsen, Roger Weber,
Michael Kempfer and Gary Hoffman,
Defendants-Respondents and
Cross-Appellants-Petitioners.

REVIEW of a decision of the Court of Appeals. *Reversed and remanded.*

LOUIS J. CECI, J. This is a review of an unpublished decision of the court of appeals, dated April 24, 1986, which reversed in part and affirmed in part a judgement by the circuit court for Milwaukee county, Circuit Judge Robert W. Landry. Specifically, the appeals court reversed the trial court's determination that the two-year statute of limitations period under §893.57, Stats., was to be applied retroactively to the civil rights claims brought by Bobby Felder under 42 U.S.C. §§1983 and 1985, against several city of Milwaukee police officers. The appeals court decided that the three-year statute of limitations, §893.54(1), should apply to Felder's claim instead of the two-year period. Second, the appeals court affirmed the trial court's holding that §893.80, Stats., the notice of claim statute, was inapplicable to §1983 actions brought in state court. Finally, the appeals court affirmed the

trial court's decision that the mere existence of state tort remedies, under which Felder might have recovered, should not operate to preclude the institution of an action based on §1983. While the issue of the applicability of §893.80 to §1983 actions brought in state court against municipalities and municipal employees presents a question of first impression, we believe that this case may be disposed of on the basis of §893.80 alone.[1] Because we believe that §893.80 does apply to federal civil rights actions which are brought in state court and because Felder

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[1]Section 893.80(1), Stats., provides that:

"*Claims against governmental bodies or officers, agents or employes; notice of injury; limitation of damages and suits.* (1) Except as provided in sub. (1m), no action may be brought or maintained against any ... governmental subdivision or agency thereof nor against any officer, official, agent or employe of the ... subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

"(a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the ... governmental subdivision or agency and on the officer, official, agent or employe under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the ... subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant ... subdivision or agency or to the defendant officer, official, agent or employe; and

"(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant ... subdivision or agency and the claim is disallowed. Failure of the appropriate body to disallow within 120 days after presentation is a disallowance. Notice of disallowance shall be served on the claimant by registered or certified mail and the receipt therefor, signed by the claimant, or the returned registered letter, shall be proof of service. No action on a claim against any defendant ... subdivision or agency nor against any defendant officer, official, agent or employe, may be brought after 6 months from the date of service of the notice, and the notice shall contain a statement to that effect."

has not satisfied the requirements of that statute, we reverse the decision of the court of appeals. Since our holding operates to bar Felder from proceeding further, we need not, under these facts, consider the remaining issues posed by the parties.

I.

Bobby Felder was stopped by Milwaukee police officers during the early evening hours of July 4, 1981, outside his home in Milwaukee. Police were combing the neighborhood, looking for an armed individual who was reported to be in the area. The police stopped Felder to question him, but according to police reports, Felder was uncooperative and began to yell and shout profanities, thereby attracting neighborhood attention. Neighbors' attempts to exonerate him were successful, as the police reportedly told Felder to leave the scene and go home. However, Felder continued to be loud and abusive and reportedly pushed an officer. Minutes later, members of the Milwaukee Police Department Tactical Enforcement Unit (TEU officers) arrived on the scene. The TEU officers proceeded to arrest Felder on charges of disorderly conduct. Felder alleges that the officers "beat [him] with batons, carried him to a paddy wagon while he was partially unconscious, and threw him through the air and into the paddy wagon." The charges against Felder, who is black, were ultimately dropped. The officers present at the scene of the arrest were all white. An armed individual was later apprehended and arrested pursuant to the officers' initial investigation.

On April 2, 1982, Bobby Felder commenced a lawsuit in Milwaukee county circuit court, naming two Milwaukee police officers as defendants. Two amended complaints (one filed in January, 1983, and the other in March, 1984) named additional police officers as defendants, as well as the city of Milwaukee and the chief of police for the Milwaukee police

department. The complaint alleged that the defendants acted under color of law to intentionally deprive Felder of his civil rights under 42 U.S.C. §§1983 and 1985(2). Felder also advanced state law tort and conspiracy claims. Felder sought compensatory and punitive damages in an amount totaling $2.3 million, plus costs and attorney fees, as provided for under 42 U.S.C. §1988.

In each of their answers, including the answers to the first and second amended complaints, defendants raised the affirmative defense of noncompliance with §893.80, Stats.

Following the voluntary dismissal of the action as to several of the defendants and the dismissal of some of the claims, trial proceeded on March 4, 1985, on four remaining claims: (1) false arrest, in violation of federal and state law; (2) use of excessive force, in violation of the Fourteenth Amendment to the United States Constitution, and assault and battery, in violation of state law; (3) false imprisonment, in violation of federal and state law; (4) conspiracy, in violation of the Fourteenth Amendment and state law.

After the defense rested its case, the trial court entertained several motions. Defendants first moved for dismissal on the basis of plaintiff's alleged failure to comply with §893.80, Stats. The court granted defendants' motions with respect to each of the claims which were based on state tort law principles, but denied the motion with respect to the remaining civil rights claims which were based on federal law. The court reasoned that §893.80 was not intended to bar the institution of a lawsuit based on federal civil rights laws. The court heard and decided other motions. In the most significant of these rulings, the trial court held that the two-year statute of limitations for intentional torts, §893.57, Stats., applied to Felder's civil rights claims, rather than the

three-year statute of limitations contained in §893.54(1), Stats., applicable generally to "injuries to the person." This holding operated to dismiss Felder's civil rights claims with respect to those defendants who were added to the lawsuit by the amended complaint, which was filed after the two-year limitations period had expired.

Felder appealed the statute of limitations question to the court of appeals. The ten remaining defendants cross-appealed, asserting that the civil rights claims should never have been brought because a notice of claim under §893.80 had never been filed. The appeals court first reversed the trial court on the statute of limitations issue, holding that the three-year period under §893.54(1) was applicable, citing *Wilson v. Garcia*, 471 U.S. 261 (1985), for support. The appeals court next addressed defendants' arguments on cross-appeal, holding that §893.80 was inapplicable to §§1983 and 1985 actions, citing *Doe v. Ellis*, 103 Wis. 2d 581, 587-88, 309 N.W.2d 375 (Ct. App. 1981). The court addressed other arguments raised by defendants in their cross-appeal and summarily affirmed the trial court on those issues. A petition for review was filed on behalf of the police officer defendants by the city attorney of the city of Milwaukee. The city sought review of three issues, including the appeals court's dispostion of the statute of limitations question and its summary affirmance of the trial court's ruling which was based on §893.80, Stats. Felder filed a cross-petition for review, arguing a violation of his constitutional rights based on actions taken by the court during the course of trial, primarily relating to the dismissal of certain defendants from the lawsuit. This court granted both the petition for review and the cross-petition for review on September 16, 1986.

II.

The issues which we believe to be dispositive in this case may be posed as follows: Do the notice of claim provisions contained in §893.80, Stats., apply to federal civil rights actions brought in state court? And, if so, were the statutory requirements enumerated therein complied with in this case?

The city argues that compliance with §893.80 is a condition precedent to the institution of any lawsuit commenced in state court against a municipality or its employees, including a lawsuit which is based on federal civil rights laws. Felder made the choice to proceed in state court and should be bound by state procedures. Section 893.80, the city further argues, is not inconsistent with the U. S. Constitution or federal law. The city argues that states are free to regulate the manner in which cases may be prosecuted in their courts provided that those regulations fall within constitutional limits, citing *Kramer v. Horton*, 128 Wis. 2d 404, 383 N.W.2d 54, *cert. denied* __U.S.__, 107 S.Ct. 324 (1986), in support.[3] The city also cites cases in other jurisdictions where courts have upheld the application of state notice statutes to federal civil rights claims and have stated that those statutes do not offend federal policy. The city states that the purpose of the statute is to enable a municipality to "compromise the claim and settle it without a costly and expensive lawsuit," quoting *Gutter v. Seamandel*, 103 Wis. 2d 1, 9, 308 N.W.2d 403 (1981). This statutory purpose does not frustrate federal law because a plaintiff who complies with the notice requirements retains the opportunity to

[3]The decision of this court in *Kramer* reversed, in part, the decision of the appeals court below. *See*, 125 Wis. 2d 177. For purposes of clarity, we will refer to the decision of the court of appeals as *Kramer I* and will refer to the supreme court decision as *Kramer II*.

negotiate and pursue the §1983 claim. The right to go forward with the civil rights claim remains unaffected. And the municipality, due to the notice requirement, is given the opportunity to investigate the claim and attempt to settle it, if desired, without being forced to proceed immediately to the adversarial setting in the courtroom. Finally, the city reiterates that it is not seeking to enforce the imposition of a state procedural rule in a federal forum; rather, it is seeking only to reaffirm the necessity of imposing state procedural rules on those litigants who choose to press their claims, whether based on state or federal law, in state court. Felder made his choice and should not now be heard to argue that state procedures should not apply to him.

Felder, on the other hand, argues that a state procedural rule cannot operate to preclude a potential litigant from obtaining relief for violations of constitutionally protected rights. Principles of supremacy, Felder argues, should control and operate to preclude application of §893.80 to claims brought in state courts under the federal civil rights laws.

III.

The court of appeals has twice addressed the question of whether the notice of claim statute applies to §1983 actions brought in state court. In *Doe*, 103 Wis. 2d 581, the appeals court held that the notice of claim statute was inapplicable to a lawsuit commenced under §1983, stating that, "We agree that this state procedural statute cannot bar a congressionally created right to obtain relief for violations of federal constitutional rights by persons acting under color of law." 103 Wis. 2d at 588. The court cited *Perrote v. Percy*, 452 F.Supp. 604 (E.D. Wis. 1978), as authority. The court in *Perrote* said that,

> Acceptance of the defendants' position [that the notice of claim statute should apply] would unacceptably elevate subtleties of state procedural law above the avenue of relief

> created by Congress for the protection of federal constitutional rights from deprivations by persons acting with state authority.

452 F.Supp. at 605 (citation omitted). Similarly, in *Kramer v. Horton*, 125 Wis. 2d 177, 371 N.W.2d 801 (Ct. App. 1985) (*Kramer I*), the appeals court, citing *Perrote* and *Doe*, held that the plaintiff's failure to comply with the notice of claim statute did not bar his claim for relief under the federal civil rights laws.

Also at issue in *Kramer* was whether the plaintiff there was required to exhaust his administrative remedies before proceeding with his §1983 action in state court. The appeals court held that the plaintiff was not required to do so. The defendants in *Kramer* petitioned this court for review of that decision, and we held that where state administrative remedies are adequate and available, a plaintiff bringing a §1983 claim is required to exhaust his administrative remedies prior to commencing suit in state court. *Kramer II*, 128 Wis. 2d at 419. In so holding, this court emphasized the inapplicability of *Patsy v. Board of Regents*, 457 U.S. 496 (1982), which held that plaintiffs pursuing §1983 claims need not exhaust administrative remedies before proceeding with litigation in federal court. The court stated that *Patsy* was not controlling under the facts in *Kramer* because *Patsy* involved a §1983 action brought in federal court, *not* state court. State courts and legislatures, as stated in *Kramer II*, retain the right under the Tenth Amendment to the U. S. Constitution "to prescribe the procedural scheme under which claims may be heard in state court." 128 Wis. 2d at 417.

This court noted further in *Kramer II* that a state court may be faced with interests and concerns which are very different from those which a federal court must deal with when deciding whether a given procedural rule, such as the exhaustion of remedies rule, should be adopted. *Id.* The court discussed those interests and concluded that application of the exhaustion doctrine to §1983 suits brought in state court is not "inherently inconsistent with" the purposes §1983 is designed to serve. *Id.* at 418.

This court in *Kramer II* never reached the issue of the applicability of the notice of claim statute to §1983 claims brought in state court. Thus, this case presents a question of first impression.

Previous decisions by this court which have dealt with the notice of claim statute and its statutory predecessors have primarily involved negligence-type actions brought against a municipality or its employees. *See, e.g., Patterman v. Whitewater*, 32 Wis. 2d 350, 145 N.W.2d 705 (1966); *Harte v. Eagle River*, 45 Wis. 2d 513, 173 N.W.2d 683 (1970). It has been said that the primary purpose of a notice of claim statute is to give the municipality the opportunity to attempt to compromise the claim and effect settlement before the parties are forced to proceed with a lengthy or costly lawsuit. *Patterman*, 32 Wis. 2d at 357.

> 'Statutory ... provisions requiring presentation of claims or demands to the governing body of the municipal corporation before an action is instituted are in furtherance of a public policy to prevent needless litigation and to save unnesessary expenses and costs by affording an opportunity amicably to adjust all claims against municipal corporations before suit is brought.'

Id., quoting 38 Am. Jur., *Municipal Corporations*, §674 at 383 (footnote omitted). Significantly, Wisconsin's notice of claim statute was limited, in previous versions, *see*, §895.43, Stats. (1975), only to tort actions. However, the current version of the statute, created by ch. 285, Laws of 1977, is not so limited and states simply that "no action may be brought ... " without statutory or actual notice of the claim.[3]

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[3]In *Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 52, 357 N.W.2d 548 (1984), this court stated that "sec. 893.80 is not a statute only applicable to tort claims or claims for negligence. The opening sentence of sec. 893.80 recites its applicability to *any* cause of action." (Emphasis added.)

Courts in other jurisdictions have explicitly held that notice of claim statutes shall apply to *all* actions, including actions founded on civil rights violations. The city cites *Indiana Dept. of Public Welfare v. Clark*, 478 N.E.2d 699 (Ind. Ct. App. 1985), *cert. denied* __U.S.__, 106 S.Ct. 2893 (1986), as an example. In *Clark*, the Indiana court decided that compliance with a notice of claim provision contained in the Indiana Tort Claims Act was a prerequisite to the institution of a §1983 suit in state court. The court rejected the plaintiff's arguments in *Clark* that the notice of claim provision was contrary to federal policy because it was arguably in the nature of a statute of limitations. Instead, the court stated that the claim provision

> is a procedural precedent which must be fulfilled before filing suit in a state court .... Because it is a procedural precondition to sue, it overrides the procedural framework of §1983 when the litigant chooses a state court forum.

478 N.E.2d at 702 (citations omitted). Also, *see, Mills v. County of Monroe*, 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, *cert. denied* 464 U.S. 1018 (1983), holding that a state notice of claim statute may be imposed on litigants suing under the federal civil rights laws in state court. With regard to the claim under 42 U.S.C. §1981 at issue in *Mills*, the court stated that,

> Although Congress established no timeliness or notice requirements to apply to section 1981 actions brought in Federal court, these courts have been instructed that, when interstices or voids occur in the Federal law, they should borrow the applicable State rule of law so long as it is not 'inconsistent with the Constitution and laws of the United States' .... This court ... does not find that the State's notice requirements are antithetical to the policy underlying the civil rights laws.

59 N.Y.2d at 309-10, 451 N.E.2d at 457 (quoting 42 U.S.C. §1988; case citations omitted). Also, *see, Robertson v. Wegmann*, 436 U.S. 584, 588 (1978). The court went on to say that a notice of claim statute is meant to serve the important state interest of enabling a municipality to protect itself against stale or

fraudulent claims, concluding that "the general restrictive effect of a state notice of claim requirement does not of itself bar its application to Federal civil rights actions" brought in state court. 59 N.Y.2d at 311, 451 N.E.2d at 458.

We are well aware that courts in other jurisdictions have refused to apply state notice of claim statutes to actions based on a violation of federal civil rights laws. *See, Perrote*, 452 F.Supp. at 605; *Willis v. Reddin*, 418 F.2d 702 (9th Cir. 1969); *Donovan v. Reinbold*, 433 F.2d 738, 742 (9th Cir. 1970); *Rosa v. Cantrell*, 705 F.2d 1208, 1221 (10th Cir. 1982), *cert. denied* 464 U.S. 821 (1983); and *Brown v. United States*, 742 F.2d 1498, 1509 n. 6 (D.C. Cir. 1984), *cert. denied* 471 U.S. 1074 (1985). The city repeatedly indicates, however, that these cases have involved the applicability of state notice provisions to civil rights suits brought *in federal court*. *But see, Williams v. Horvath*, 16 Cal. 3rd 834, 129 Cal. Rptr. 453, 548 P.2d 1125 (1976). Thus, their applicability to these facts--where the issue is whether a state notice of claim statute should be applied to a federal claim brought *in state court*--is arguably minimal, if not nonexistent.[4]

The city argues, persuasively, that our recent holding in *Kramer II* provides substantial support for the proposition that a state may impose procedural requirements on litigants choosing a state forum for adjudication of their federal civil rights claims and that it, and not the cases cited by Felder, *supra*, should be dispositive. We agree. We see no reason why, consistent with our holding in *Kramer II*, a litigant availing himself or herself of state court

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[4]For this reason, we are not convinced by the analysis of the appeals court in *Kramer I* and *Doe*. To support these holdings, the court of appeals necessarily relied on the decision of the federal court in *Perrote*, which involved the distinct question of the applicability of the state notice of claim statute to 42 U.S.C. §1983 claims brought in a *federal* forum.

resources should not be required to abide by state court rules and procedures, including the notice of claim provision at issue here. We now hold that failure to comply with §893.80, Stats., bars a litigant who is pressing a federal civil rights claim from proceeding with that claim in state court. "While the Constitution vests in Congress 'the power to prescribe the basic procedural scheme under which claims may be heard in federal courts,' ... it reserves to the state legislatures and state courts the power to prescribe the procedural scheme under which claims may be heard in state court." *Kramer II*, 128 Wis. 2d at 417 (citation omitted). The point we wish to reiterate is simply that litigants who choose to press their claims in state court cannot "elect" to ignore state procedural rules. The right to sue in state court is accompanied by the corrollary duty to abide by certain rules and procedures. Section 893.80 is an example of just such a procedure.

The remedial and deterrent purposes underlying §1983 actions are not frustrated simply because a state court litigant must abide by state court procedures. The notice of claim statute does not operate to limit the amount that a plaintiff might recover for a violation of his or her civil rights.[5] Nor does the notice requirement operate to preclude a plaintiff's possibility for recovery. The plaintiff remains free, of course, to litigate the civil rights claims in federal court. *See, Kramer II*, 128 Wis. 2d at 419. Our holding in no way precludes plaintiff from pursuing that option.

Even if the plaintiff gave no statutorily required written notice, and it is undisputed that he did not, that failure is not fatal under the statute if the city had "actual notice" of the claim *and* if the plaintiff

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[5]Analogies made by Felder to *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 340 N.W.2d 704 (1983), are therefore inapplicable.

shows that the failure to give notice was not prejudicial to the city. Felder contends that the city received actual notice of his claim within hours of his arrest. He points to the presence of city of Milwaukee alderman Roy Nabors at the scene of the arrest and argues that the city police department had completed the initial phase of its investigation into the Felder arrest within hours of its occurrence. Felder further maintains that the city was not prejudiced by plaintiff's failure to provide it with statutory notice of the claim.

It is conceded that a police investigation into Felder's arrest was underway shortly after its occurrence. The record contains several police reports, each of which was individually prepared by the various officers who were present during the arrest or who directly participated in it. The police captain in charge of the district in which the arrest occurred was made aware of the arrest and of the various police reports. The record also reflects that alderman Nabors contacted then police chief Harold Breier, by letter, to personally inform him of the Felder incident.[6] Felder argues that these facts would support a finding that the city had actual notice of the claim, sufficient to satisfy the statute.

We disagree. In *Nielsen v. Town of Silver Cliff*, 112 Wis. 2d 574, 334 N.W. 2d 242 (1983), we held that the defendant municipality had actual notice of the

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[6]Alderman Nabors' letter, dated July 7, 1981, reads in pertinent part as follows:

"Dear Chief Breier:

"This note conveys the enclosed complaints originally made verbally to me about 10:00 p.m. on July 4, 1981.

" ...

"Please review the enclosed complaints, and let me know the results of your investigation ...."

Attached to the note were the "complaints" of five individuals, each of whom described their recollection of the events of the evening in question.

plaintiffs' claim, despite the fact that the written communications said to satisfy the actual notice standard were not received until more than 120 days after the event causing the injury had occurred. However, the "actual notice" came in the form of two letters: (1) a letter from plaintiffs' attorney to the city's insurer, notifying the insurer of his clients' injuries, and (2) a letter to the municipality from the plaintiffs themselves which included a *claim for damages*. 112 Wis. 2d at 581. The court in *Silver Cliff* cited *Wiss v. Milwaukee*, 79 Wis. 2d 213, 255 N.W. 2d 496 (1977), to support its holding. In *Weiss*, it was also undisputed that the defendant municipality never received timely written notice. However, the court there found that, again, a written claim for damages, submitted nearly two years after the accident in question, was sufficient to satisfy the "actual notice" standard. 79 Wis. 2d at 223, 228.

While we do not hold that a detailed claim for damages must be submitted before the actual notice standard can be satisfied, *see, Figgs*, 121 Wis. 2d at 51-52, we nevertheless do not believe that the communication from alderman Nabors is sufficient to satisfy the actual notice standard. Nor are the "communications" to the city via the district police reports sufficient. Documents which have been held to constitute adequate notice have usually, at a minimum, recited the facts giving rise to the injury and have indicated an intent on the plaintiffs' part to hold the city responsible for any damages resulting from the injury. *See Patterman*, 32 Wis. 2d at 353-54; *Harte*, 45 Wis. 2d at 521; *Silver Cliff*, 112 Wis. 2d at 576; *Figgs*, 121 Wis. 2d at 47; *Gutter*, 103 Wis. 2d at 5; *Lang v. Cumberland*, 18 Wis. 2d 157, 158, 118 N.W.2d 114 (1962).

The record in this case does not support a finding of actual notice. Therefore, we need not delve into the question of whether the city suffered prejudice as a result of the plaintiff's failure to provide notice. In

sum, we hold that plaintiffs advancing federal civil rights claims in state court are required to comply with the notice of claim statute, §893.80, Stats. Felder's failure to do so here, via either statutory or actual notice, operates to preclude him from proceeding further in this action in state court. We therefore reverse the decision of the court of appeals and remand to the trial court with instructions to dismiss this action.

By the Court.--The decision of the court of appeals is reversed, and the cause is remanded to the circuit court with instructions.

No. 85-1344

STATE OF WISCONSIN
IN SUPREME COURT

BOBBY FELDER,
Plaintiff-Appellant, Cross-Respondent
and Cross-Petitioner,

v.

DUANE CASEY, et al.,
Defendants-Respondents
and Cross-Appellant-Petitioners.

SHIRLEY S. ABRAHAMSON, J. (dissenting). The court's holding bars a citizen of Milwaukee who alleges he was beaten by police officers from seeking a federal remedy (sec. 1983) in state court because he did not file written notice of the circumstances of his claim. This court maintains this position even though the city concedes it was actually notified (but not in compliance with the statute), and the circuit court made no finding with regard to whether the city suffered any prejudice as a result of the plaintiff's failure to file the notice.

I cannot join the majority in concluding that the notice of claims provision (sec. 893.80), enacted in response to the abrogation of sovereign immunity, was intended to or should somehow override a federally created remedy designed to vindicate civil rights.

I conclude that sec. 893.80 is inapplicable to this lawsuit for two reasons: the intent of Congress and the intent of the Wisconsin legislature. Neither Congress nor the Wisconsin legislature intended the

Wisconsin notice of claims statute to apply to a 1983 action is state courts.

The United States Supreme Court has apparently concluded that Congress intended sec. 1983 actions to be viewed as analogous to claims for personal injuries sounding in tort, not as analogous to state remedies for wrongs committed by public officials. *Wilson v. Garcia*, __U.S.__, 105 S.Ct. 1938. 1949(1985). If this court were to treat this case like a personal injury claim sounding in tort, as Congress apparently intended, and not like a remedy for wrongs committed by a governmental officer, sec. 893.80 would not be applicable. Our court has concluded that state courts dealing with sec. 1983 claims should implement only state laws which are "not inconsistent with the constitution and laws of the United States." *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 340 N.W.2d 704 (1983). I conclude that the majority's applying the notice of claims statute (sec. 893.80) is inconsistent with the laws of the United States.

Furthermore, I believe that the Wisconsin legislature did not intend sec. 893.80 to apply to federal causes of action against governmental officers. The Wisconsin legislature adopted sec. 893.80, Stats. 1985-86, in response to *Holytz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), which abrogated the principle of governemental immunity from tort liability. The state judicial doctrine of governmental immunity is not generally a significant concept in sec. 1983 litigation. *Brown v. United States*, 742 F. 2d 1498, 1507-10 (D.C. Cir. 1984). While I recognize that sec. 893.80 is no longer limited to tort claims, I do not believe that the legislature intended sec. 893.80 to be applicable to this federal cause of action.

For the reasons set forth, I dissent. I am authorized to state that Chief Justice Nathan S. Heffernan joins in this dissent.

No. 85-1344

STATE OF WISCONSIN
IN SUPREME COURT

Bobby Felder,
Plaintiff-Appellant, Cross-Respondent
and Cross-Petitioner,

v.

Duane Casey, Patrick Eaton, Robert Farkas, Peter Pochowski, Robert Connolly, Edward Heideman, Stanley Olsen, Roger Weber, Michael Kempfer and Gary Hoffman,
Defendants-Respondents and
Cross-Appellants-Petitioners.

WILLIAM A. BABLITCH, J. (dissenting). Bobby Felder, a black citizen of Milwaukee, was arrested on Independence Day, July 4, 1981, for a crime he did not commit. During the course of the arrest, witnessed by his neighbors and family, he was allegedly beaten by five Milwaukee police officers and thrown partially unconscious into the back of a paddy wagon. Within hours, an alderman from the City was on the scene. Also within hours, the Milwaukee Police Department had other officers on the scene investigating the incident and taking statements from witnesses, a process that continued for two days. By July 7, the Chief of Police was informed of the incident by letter from the alderman who was at the scene. I dissent.

One can scarcely conceive of facts more ripe for resolution under sec. 1983.

Yet the majority today denies Bobby Felder access to the state courts to litigate his sec. 1983 claim.

The majority concludes that his failure to formally file a "Notice of Claim" with the Milwaukee City Clerk within the 120 days set by Wisconsin statutes, sec. 893.80, Stats., denies him access to the state courts. Although that statute also allows *actual* notice in lieu of formal written notice, the majority concludes that no *actual* notice of this incident was given to the City.

In *Perrote v. Percy*, 452 F. Supp. 604 (E.D. Wis. 1978) the court ruled the notice provision of sec. 895.45(1), Stats. 1975, (actions against state officials) did not apply to a sec. 1983 action because

> "[a]cceptance of the defendants' position would unacceptably elevate subtleties of state procedural law above the avenue of relief created by Congress for the protection of federal constitutional rights from deprivations by persons acting with state authority." *Id.* at 605.

The majority attempts to distinguish *Perrote* by pointing out that *Perrote* was brought in federal court, while this claim was brought in state court. Apparently, the majority preceives that although it is inappropriate to elevate subtleties of state procedural law above the relief Congress intended in federal court, it is appropriate to do so in state court.

I conclude that a 120 day notice requirement is a subtlety of state procedural law that must give way to the vindication of federal rights in state courts.

The failure to do so by the majority is made more egregious by their conclusion that there was no *actual* notice by the City, notwithstanding the facts that the alleged acts were done by five agents of the City, a City alderman came to the scene within hours, an investigation was begun within hours by other police officers, further investigation by police supervisory officers took place within 48 hours, and direct com-

munication was given within three days to the Chief of Police of the City. One of the primary purposes of the notice statute is to allow the government unit an opportunity to promptly investigate such incidents. As this court said in *Nielsen v. Town of Silver Cliff*, 112 Wis. 2d 574, 580, 334 N.W. 2d 242:

> "The purpose of sec. 895.43(1) is to avoid prejudice to governmental units resulting from the late filing of claims. Specifically, the notice requirements are designed to ensure that governmental units have a sufficient opportunity to investigate all incidents giving rise to tort claims. Thorough investigations guard against specious claims and may help prevent similar accidents in the future."

That purpose was more than fulfilled in this case. If these facts and circumstances do not constitute *actual* notice under the statute, "actual notice" has become meaningless.

DISTRICT I

OFFICE OF THE CLERK
COURT OF APPEALS
OF Wisconsin

Marilyn L. Graves
Clerk

Barbara Zack Quindel
1219 N. Cass Street
Milwaukee, WI 53202

To:
R. Scott Ritter
Asst. City Attorney
200 E. Wells Street
Milwaukee, WI 53202

Madison, April 24, 1986
Clerk of Circuit Court
(L.C. #579-956)
(Milwaukee, County)

Hon. Robert W. Landry
Milwaukee Co. Courthouse

You are hereby notified that the Court entered the following opinion and order:

85-1344 Bobby Felder v. Duane Casey, Patrick Eaton, et al.

Before Moser, P.J., Wedemeyer and Sullivan, JJ.

Bobby Felder appeals, in part, from a judgment dismissing his federal civil rights claims against certain employees of the Milwaukee Police Department as barred by the statute of limitations, sec. 893.57, Stats. Eight defendants cross-appeal, asserting that the federal claims were improperly brought. Based on our review of the briefs and record at conference, we conclude that this case is appropriate for summary disposition. *See* Rule 809.21, Stats. We reverse the trial court on the statute of limitations issue, affirm on the issues raised in the cross-appeal, and remand the cause for further proceedings.

Felder, a black man, alleges that on July 4, 1981, several white Milwaukee police officers arrested him for disorderly conduct, beat him with night sticks and threw him into a paddy wagon. After the charges against Felder were dropped, he sought compensatory and punitive damages for violation of his state and federal constitutional rights. He also sought damages for various state torts and a conspiracy to cover up related police misconduct. Felder brought his federal claims under 42 U.S.C. secs. 1983 and 1985(2). On March 4, 1984, Felder filed his second amended complaint, naming as additional defendants the eight police officers who are the cross-appellants.

Four days into trial, the trial court, *sua sponte*, held that the two-year statute of limitations for intentional torts, sec. 893.57, Stats., applied to actions brought under 42 U.S.C. secs. 1983 and 1985(2). Accordingly, the court dismissed the federal civil rights claims against the eight defendants brought into the case by the second amended complaint; Felder appeals.

The United States Supreme Court recently construed 42 U.S.C. sec. 1983 "as a directive to select, in each State, the one most appropriate statute of limitations for all [sec.] 1983 claims." *Wilson v. Garcia*, 105 S. Ct. 1938, 1947 (1985). The Court then characterized all sec. 1983 actions as involving claims for personal injuries. *Id.* at 1949. This court subsequently held that *Wilson* required that all sec. 1983 actions brought in Wisconsin be filed within the three-year limitation period for personal injury actions, sec. 893.54(1), Stats. *Hanson v. Madison Service Corp*, 125 Wis. 2d 138, 141, 370 N.W.2d 586, 588 (Ct. App. 1985). We also held that *Wilson's* interpretation of sec. 1983 is retroactive. *Id.* at 140, 370 N.W.2d at 587. Because Felder filed his second amended complaint within three years of the date on which he was

allegedly arrested and beaten, the trial court erred in dismissing his secs. 1983 and 1985(2) claims.

The police officers cross-appeal, arguing that even if Felder's claims are not barred by the statute of limitations, they are barred by his failure to comply with the notice of claims statute sec. 893.80, Stats., and by *Parratt v. Taylor*, 451 U.S. 527 (1981). We disagree.

The officers' first argument fails because sec. 893.80, Stats., does not apply to federal civil rights claims brought under 42 U.S.C. secs. 1983 and 1985(2). *See Doe v. Ellis*, 103 Wis. 2d 581, 587-88, 309 N.W.2d 375, 377 (Ct. App. 1981) (regarding predecessor statute, sec. 895.45, Stats. (1977)). The officers' second argument that *Parratt* precluded Felder from bringing a sec. 1983 claim against them because a basis for liability existed under state tort law also fails. The United States Supreme Court, since deciding *Parratt*, has stated that "the remedy provided in §1983 [is] independently enforceable whether or not it duplicates a parallel state remedy." *Wilson*, 105 S.Ct. at 1949.

Moreover, *Parratt* is limited implicitly to procedural due process claims and, thus, does not apply to substantive constitutional violations, which are complete at the moment the harm occurs, regardless of any available post-deprivation remedies. *See Gilmere v. City of Atlanta*, 774 F.2d 1495, 1500 (11th Cir. 1985) (en banc). The intentional infliction of personal injury by means of excessive police force is a completed violation of substantive due process and, thus, is outside the scope of *Parratt*. *See id.*; *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 872 (7th Cir. 1983) (substantive due process claims survive *Parratt*). Therefore, the existence of state post-deprivation tort remedies has no bearing on Felder's federal civil rights claims. *Gilmere*, 774 F.2d at 1500.

Upon the foregoing reasons,

IT IS ORDERED that those portions of the judgment entered July 11, 1985, dismissing Felder's federal civil rights claims against those eight defendants who were brought into the case by Felder's second amended complaint are summarily reversed pursuant to Rule 809.21, Stats.

IT IS FURTHER ORDERED that those portions of the judgment entered July 11, 1985, denying the motion for judgment on the pleadings, denying the motion to dismiss for failure to comply with sec. 893.80, Stats., and denying Kempfer's motion to dismiss for failure to state a claim upon which relief could be granted are summarily affirmed pursuant to Rule 809.21, Stats.

IT IS FURTHER ORDERED that the cause is remanded for further proceedings consistent with this opinion.

Marilyn L. Graves
Clerk of Court of Appeals

State of Wisconsin

CIRCUIT COURT

Milwaukee County

BOBBY FELDER
Plaintiff,

v.

MICHAEL KEMPFER, et al.,
Defendants.

AMENDED ORDER FOR JUDGMENT
Case No. 579-956

This action having come before the Court on Febuary 25, 1985, on a motion of the plaintiff to dismiss this action without costs as to defendants John Bauer, Joseph Husar, Harold A. Breier, Leonard Ziolkowski and the City of Milwaukee, and a motion for judgment on the pleadings by all defendants seeking dismissal based upon plaintiff's failure to comply with sec. 893.80, Stats., and

Thereafter, at the close of plaintiff's case, on March 8, 1985 and March 11, 1985, on motions by defendants' and plaintiff's counsel and *sua sponte* action by the Court including, chronologically, a motion to dismiss by all defendants for failure to comply with sec. 893.80, Stats., a motion by all defendants to dismiss all equal protection causes of action based upon failure to state a claim upon which relief could be granted, a motion by defendants Pochowski, Olsen, Weber, Connolly, Heideman, Farkas, Casey and Eaton to dismiss all state tort claims based upon the applicable statute of limitations, sec. 893.57, Stats., *sua sponte* action by the Court dismissing all civil rights claims against defendants Pochowski, Olsen, Weber, Connolly, Heideman, Farkas, Casey and Eaton based upon paragraph 66 of the Second Amended Answer and the applicable statute of

limitations, sec. 893.57, Stats., a motion by plaintiff for clarification/reconsideration of the Court's aforementioned *sua sponte* action, a motion by defendants Kempfer and Hoffman to dismiss the remaining civil rights causes of action against them for failure to state a claim upon which relief could be granted, a motion by plaintiff for a mistrial based upon the Court's prior rulings, a motion by plaintiff to dismiss the remaining causes of action against defendants Kempfer and Hoffman without prejudice, and a motion by defendants Kempfer and Hoffman to dismiss all remaining causes of action against them with prejudice for failure to prosecute, and

The Court having heard arguments of counsel, having considered the applicable statutes and case law, and having issued oral decisions from the bench with respect to each motion, and

The Court having, on April 10, 1985, entered a written order for judgment, and having thereafter, on May 1, 1985, considered plaintiff's objections to said order, and having concluded that the April 10, 1985 order for judgment should be vacated, modified, and then, as modified, entered, now therefore,

IT IS HEREBY ORDERED that:

1. The April 10, 1985 order for judgment is vacated.

2. The motion of plaintiff to dismiss this action without costs as to defendants Bauer, Husar, Breier, Ziolkowski, and the City of Milwaukee is granted.

3. The motion by all defendants for judgment on the pleadings is denied.

4. The motion by all remaining ten defendants to dismiss the action based upon plaintiff's failure to comply with the provisions of sec. 893.80, Stats., is

granted as to all state claims and denied as to all federal claims.

5. The motion by all defendants to dismiss all equal protection causes of action based upon failure to state a claim upon which relief could be granted is taken under advisement.

6. All causes of action are dismissed as to defendants Pochowski, Olsen, Weber, Connolly, Heideman, Farkas, Casey and Eaton based upon the applicable statute of limitations, sec. 893.57, Stats.

7. The motion by plaintiff for clarification/reconsideration of the Court's decision to dismiss all causes of action based upon the applicable statute of limitations, sec. 893.57, Stats., respecting defendants Pochowski, Olsen, Weber, Connolly, Heideman, Farkas, Casey and Eaton is granted, and upon such reconsideration, the Court's decision dismissing those defendants is reaffirmed.

8. The motion by remaining defendants Kempfer and Hoffman to dismiss the civil rights causes of action for failure to state a claim upon which relief could be granted is denied with respect to defendant Kempfer and taken under advisement with respect to defendant Hoffman.

9. The motion by plaintiff for a mistrial is denied.

10. The motion by plaintiff to dismiss the remaining causes of action against defendants Kempfer and Hoffman without prejudice is denied.

11. The motion by defendants Kempfer and Hoffman to dismiss all remaining causes of action against them with prejudice for failure to prosecute pursuant to sec. 805.03, Stats., is granted.

12. The plaintiff's complaint against all defendants is hereby dismissed upon the merits and the defendants Pochowski, Olsen, Weber, Connolly, Heideman, Farkas, Casey, Eaton, Kempfer and Hof-

fman are, pursuant to sec. 814.03, Stats., awarded all costs and disbursements as are allowed by law.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated at Milwaukee, Wisconsin this 23 day of May, 1985.

BY THE COURT:
/s/Hon. ROBERT W. LANDRY
Hon. ROBERT W. LANDRY
Circuit Court Judge

No. 87-526

In The
Supreme Court of the United States
October Term, 1987

BOBBY FELDER,

Petitioner,

v.

DUANE CASEY, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATEMENT OF THE CASE

Respondents accept Petitioner's statement of the case, as supplemented by the following information concerning the decision by the Wisconsin Supreme Court. Respondents further accept the Appendix of Petitioner, and will make reference thereto in the same manner employed by Petitioner.

In its decision, the Wisconsin Supreme Court carefully analyzed and obviously replied heavily upon the decisions of two other state appellate courts, from Indiana and New York, wherein a state notice of claim statute was held applicable to a federal cause of action brought in state court. In discussing *Clark v. Indiana Dept. of Public Welfare*, 478 N.E.2d 699 (Ind. Ct. App. 1985), *cert. denied*, 106 S. Ct. 2893 (1986), the Wisconsin Supreme Court accepted the *Clark* court's position that such a claim statute

> is a procedural precedent which must be fulfilled before filing suit in state court ... Because it is a procedural precondition to sue, it overrides the procedural framework of Sec. 1983 when the litigant chooses a state court forum. 478 N.E.2d at 702 (citations omitted). [A-10]

Similarly, the Wisconsin Supreme Court quoted the New York decision, *Mills v. County of Monroe*, 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, *cert. denied*, 464 U.S. 1018 (1983), wherein the New York Court of Appeals stated:

> Although Congress established no timeliness or notice requirements to apply to section 1981 actions brought in Federal court, these courts have been instructed that, when interstices or voids occur in the Federal

law, they should borrow the applicable State rule of law so long as it is not 'inconsistent with the Constitution and laws of the United States' . . . . This court . . . does not find that the State's notice requirements are antithetical to the policy underlying the civil rights laws. 59 N.Y.2d at 309-310, 451 N.E.2d at 457 (quoting 42 U.S.C. Sec. 1988; case citations omitted). [A-10]

The Wisconsin Supreme Court also discussed its prior decisions on the beneficial purposes served by Sec. 893.80, Stats., referring to *Patterman v. Whitewater*, 32 Wis 2d 350, 145 N.W.2d 705 (1966) and *Harte v. Eagle River*, 45 Wis. 2d 513, 173 N.W.2d 683 (1970). The Court stated:

> It has been said that the primary purpose of a notice of claim statute is to give the municipality the opportunity to attempt to compromise the claim and effect settlement before the parties are forced to proceed with a lengthy or costly lawsuit. *Patterman*, 32 Wis. 2d at 357. [A-9]

The Wisconsin Supreme Court went on to point out that

> The remedial and deterrent purposes underlying Sec. 1983 actions are not frustrated simply because a state court litigant must abide by state court procedures. The notice of claim statute does not operate to limit the amount that a plaintiff might recover for a violation of his or her civil rights. [footnote omitted] Nor does the notice requirement operate to preclude a plaintiff's possibility for recovery . . . . [A-12]

Finally, it should be noted that, having concluded that Sec. 893.80, Stats., is a condition precedent to the bringing of a federal civil rights cause of action in a Wisconsin state court, the Wisconsin Supreme Court then concentrated its attention upon whether Petitioner Felder had complied with the notice of injury portion of the statute, as set forth in Sec. 893.80 (1)(a), Stats., and concluded that Felder had not.

Accordingly, the court was not called upon to decide whether Felder had complied with the second portion of that statute, i.e., Sec. 893.80 (1)(b), Stats., with respect to the filing of an "itemized statement of the relief sought." The record in this case is completely devoid of any such filing.

—o—

REASONS FOR DENYING THE WRIT

I. THE EXISTENCE OF A SPLIT OF AUTHORITY AMONG STATE COURTS OF LAST RESORT DOES NOT FORM THE BASIS FOR THE GRANTING OF THE WRIT

The narrow issue decided by the Wisconsin Supreme Court in the instant action was whether, in balancing the interests of all concerned, the procedural aspects of Sec. 893.80 (1), Stats., should apply as a condition precedent to bringing a federal cause of action in a Wisconsin state court in the same manner as it applies to any other cause of action.

That decision is founded in the hornbook principle that "While the Constitution vests in Congress 'the power to prescribe the basic procedural scheme under which claims may be heard in federal courts,' " *Kramer v. Horton*, 128 Wis. 2d 404, 417, 383 N.W.2d 54 (1986), quoting *Patsy v. Board of Regents*, 457 U.S. 496 at 501 (1982), the Tenth Amendment to the Constitution of the United States "re-

serves to the state legislatures and state courts the power to prescribe the procedural scheme under which claims may be heard in state court." *Kramer v. Horton*, 128 Wis. 2d at 417.

The Tenth Amendment to the Constitution of the United States provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

As the Wisconsin Supreme Court pointed out in its decision, while Wisconsin's notice of claim statute was limited, in previous versions, only to tort actions, the statute was amended (and thereby expanded) by passage by the Wisconsin legislature of Chapter 285, Laws of 1977, to apply to *any* cause of action [A-9].

Accordingly, that act represents a conscious decision on the part of the Wisconsin legislature to require, as a matter of sound public policy and judicial economy, compliance with the notice of claim provisions of Sec. 893.80 (1), Stats., as a condition precedent to the bringing of any action in *state* court.

Given the judicially recognized purpose of the statute, i.e., to "afford the municipality an opportunity to compromise the claim and settle it without a costly and expensive lawsuit," *Gutter v. Seamandel*, 103 Wis. 2d 1, 9, 308 N.W.2d 403 (1981), such a requirement can hardly be said to be inconsistent with the Constitution and the laws of the United States. Notice to the municipality of an alleged injury, coupled with a demand for relief which provides the municipality with an opportunity to settle the claim prior to litigation, is clearly not, as the New York

Court of Appeals agreed, "antithetical to the policy underlying the civil rights laws." *Mills v. County of Monroe*, 451 N.E.2d at 457. Indeed, providing such a procedural framework may well foster early resolution of such claims, certainly a laudable result beneficial to both the claimant and the municipality involved.

As Petitioner correctly points out, there has been a split among state courts of last resort on the issue of whether a state notice of claim statute should apply to federal civil rights cases brought in state court. California, in *Williams v. Horvath*, 16 Cal.3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976), Idaho, in *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888 (1982), and Oklahoma, in *Wilborn v. City of Tulsa*, 721 P.2d 803 (Okla. 1986), have analyzed their state statutes and concluded that such statutes are inapplicable to federal actions brought in their state courts.

On the other hand, two states, in addition to Wisconsin, have now held, based upon their own analysis of their state notice of claim statutes, the policies behind such statutes, the impact of requiring compliance with such statutes, and the applicable caselaw, that such statutes are not violative of the Constitution or the laws of the United States.

As indicated earlier, the New York Court of Appeals upheld the applicability of a notice of claim requirement to a state court action under 42 U.S.C. Sec. 1981 in *Mills v. County of Monroe*, 59 N.Y.2d 307, 451 N.E.2d 456, 464 N.Y.S.2d 486, *cert. denied*, 464 U.S. 1018 (1983). That same court also applied the notice of claim requirement to a state court Sec. 1983 action in *423 South Salina Street*

v. City of Syracuse, 68 N.Y.2d 474, 503 N.E.2d 63, 410 N.Y.S.2d 507 (1986), *appeal dismissed*, 107 S.Ct. 1880 (1987).

More recently, in an extremely well reasoned opinion, the Indiana Court of Appeals upheld the applicability of the Indiana state tort claim act notice provision in *Clark v. Indiana Dept. of Public Welfare*, 478 N.E.2d 699 (Ind. Ct. App. 1985), *cert. denied*, 106 S.Ct. 2893 (1986).

Clearly, the procedural requirement of each such notice of claim statute, and the impact of such requirement on the viability of the Sec. 1983 claim in the particular state, is unique to that state. In that respect, this Court should note that while compliance of the notice of claim statute, Sec. 893.80 (1), Stats., is, by virtue of the Wisconsin Supreme Court's decision in the instant action, a condition precedent to state court Sec. 1983 actions in Wisconsin, the Wisconsin Supreme Court has also opined that the statutory recovery limit set forth in Sec. 893.80 (3), Stats., ($25,000, raised to $50,000 by ch. 63, Laws of 1981) is not applicable to Sec. 1983 actions in Wisconsin state courts, since "the purpose behind Sec. 1983 would be . . . defeated if deprivation of constitutional rights was not fully compensated because of a state statutory recovery ceiling." *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 298, 340 N.W.2d 704 (1983).

In analyzing the issue, the *Thompson* court stated:

> State law cannot be used where its application would frustrate federal policies. The policy behind sec. 1983 civil rights actions is one of compensation for actual injury. Insofar as the state recovery ceiling prevents realization of that policy, it must give way. We conclude that the limitation on municipal liability set forth in sec. 893.80, Stats. has no application to a damage award under 42 U.S.C. sec. 1983.

The *Thompson* court also upheld the awarding of attorney's fees pursuant to 42 U.S.C. Sec. 1988 to a prevailing plaintiff in a Sec. 1983 action. *Thompson v. Village of Hales Corners*, 115 Wis.2d at 309.

Accordingly, it is apparent that the Wisconsin Supreme Court not only recognized the federal policy behind Sec. 1983, but has also concluded that the procedural notice of claim requirements of Sec. 893.80, Stats., do not frustrate that policy.

However, since each state's statutes on notice of claim varies, both in procedural requirements and impact on the aforementioned federal policy, the existence of a split in authority in state courts of last resort does not, *a priori*, result in the conclusion that the split must be reconciled. Rather, it merely serves to recognize the proposition that state appellate courts, rather than federal courts, are the best forums for interpretation of state statutes. While this Court may decide to review the decision of the Wisconsin Supreme Court in the case at bar on the issue of whether applicability of Wisconsin's notice of claim statute frustrates the policy behind Sec. 1983 actions, it should not do so merely because of the aforementioned split of authority.

II. THE WRIT SHOULD BE DENIED BECAUSE THE DECISION BELOW DOES NOT RAISE IMPORTANT ISSUES IMPLICATING ESTABLISHED PRINCIPLES OF FEDERALISM

Petitioner has cited a number of authorities for the proposition that a number of federal courts of appeal have

rejected the application of state notice of claim requirements to Sec. 1983 litigation (Petitioner's Brief at p. 14). However, the cited cases are irrelevant to the issue at bar, since they stand for the proposition, in general terms, that state notice of claim requirements are inapplicable to Sec. 1983 litigation in *federal* court. Respondents have not in the instant action suggested the contrary. The issue at bar is whether a state notice of claim requirement is applicable to Sec. 1983 litigation in *state* court.

In *Thompson v. Village of Hales Corners,* 115 Wis.2d 289, 296-297 (1983), the Wisconsin Supreme Court discussed the Supremacy Clause of the United States Constitution, stating:

> Article VI, clause 2 of the United States Constitution provides: "[T]his constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land." The United States Supreme Court has interpreted the Supremacy Clause to require that "any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law, must yield." *Free v. Bland,* 369 U.S. 663, 444 (1962); *Gibbons v. Ogden,* 22 U.S. 1, 210-211 (1824). In considering the validity of a state act under the Supremacy Clause, the question is whether the challenged statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Perez v. Campbell,* 402 U.S. 637, 649 (1970) or results in "frustration and erosion of the congressional policy embodied in federal rights." *Ridgway v. Ridgway,* 454 U.S. 46, 54 (1981).

Given the many laudable benefits to both claimant and governmental entity which compliance with the notice of claim statute provides, including, without limitation, the opportunity to promptly compromise the claim in a non-adversarial setting, without the expense and inevitable delays which accompany litigation, it is difficult to conceive of how such a requirement of compliance "frustrates" federal policy, or would serve to force plaintiffs out of the state court system and into the federal courts.

This is particularly true because in Wisconsin, the statutory recovery limit and Sec. 1988 attorney's fees issues have already been resolved in plaintiff's favor. Accordingly, the kind of concern expressed by Justice Brennan on behalf of the majority in *Maine v. Thiboutot,* 448 U.S. 1, 11 n.12 (1980) that "[i]f fees were not available in state courts, federalism concerns would be raised because most plaintiffs would have no choice but to bring their complaints concerning state actions to federal courts" is not a legitimate argument.

There was no suggestion in the decision of the Wisconsin Supreme Court in the instant case, nor can there be, that the court was unwilling or unable to apply the substantive aspects of Sec. 1983 law to any such cases brought in the Wisconsin state court system. Indeed, the court's history proves the contrary.

Accordingly, this Court should not grant the Petitioner's writ because of some hypothetical suggestion that, in the future, the decision will encourage "the adoption by state courts of policies inhospitable to plaintiffs who prefer to litigate their Sec. 1983 claims in state courts." (Petitioner's Brief at p. 15).

III. THE WRIT SHOULD BE DENIED BECAUSE THE DECISION OF THE WISCONSIN SUPREME COURT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT REQUIRING STATE COURTS THAT ENTERTAIN FEDERALLY-CREATED ACTIONS, INCLUDING SEC. 1983 ACTIONS, TO APPLY THE ENTIRE FEDERAL CAUSE OF ACTION WITH ALL ITS REMEDIAL ATTRIBUTES

Petitioner's third argument in favor of granting the writ is based upon the false premise that the decision of the Wisconsin Supreme Court below fails to apply the entire federal cause of action (Sec. 1983) with all its remedial attributes. The fact that the Wisconsin Supreme Court described the state notice of claim requirement as procedural and that petitioner disagrees with that characterization does not render the requirement substantive, nor does it "limit access to state courts by litigants." (Petitioner's Brief at p. 19).

The Wisconsin Supreme Court has long recognized that state courts do have subject matter jurisdiction over claims based upon Sec. 1983. *Kurtz v. City of Waukesha*, 91 Wis.2d 103, 108, 280 N.W.2d 757 (1969), and that "[s]tate law cannot be used where its application would frustrate federal policies. The policy behind Sec. 1983 Civil Rights Actions is one of compensation for actual injury." *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 304 (1983).

As pointed out earlier in Argument I, *infra*, this Court has stated that state procedural statutes should be utilized as long as they are "not inconsistent with the Constitution and Laws of the United States." *Robertson v. Wegman*, 436 U.S. 584, 588 (1978).

Also, the Wisconsin Supreme Court's characterization of Sec. 893.80(1), Stats., as procedural is not unique. In *Clark v. Indiana Dept. of Welfare*, 478 N.E.2d 699 (1985), a decision by the Court of Appeals of Indiana, First District, the court stated at p. 712:

> The ITCA [Indiana Tort Claims Act] notice provision is not a statute of limitation [citation omitted]. Rather, it is a procedural prerequisite which must be fulfilled before filing suit in state court [citation omitted]. Because it is a procedural precondition to sue, it overrides the procedural framework of Sec. 1983 when a litigant chooses a state court forum [citations omitted]. Despite the holding in *Bell* we find the 180 day notice of claim provision applies to Sec. 1983 actions brought in state court [citation omitted].

Not only was a petition for rehearing denied (July 10, 1985) in that case, but certiorari was denied by this Court, *Clark v. Indiana Dept. of Public Works*, 106 S.Ct. 2893 (1986).

Compliance with the requirement of Sec. 893.80(1), Stats., much like compliance with the filing and service requirements for initiation of a lawsuit in Wisconsin state courts, is a well-founded procedural rule which plaintiffs should be required to follow. Where followed, the doors to the courthouse swing open, and the substantive aspects of the federal cause of action under Sec. 1983, with its panoply of remedial attributes, is available to a plaintiff in the same way, and to the same extent, that they are available in federal court.

IV. THE WRIT SHOULD BE DENIED BECAUSE THE DECISION OF THE WISCONSIN SUPREME COURT IS NOT IN CONFLICT WITH PRINCIPLES DEVELOPED BY THIS COURT IN CONSTRUING SEC. 1983

Petitioner's final argument is based in part upon the conclusion that this Court, in deciding in *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982), that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to Sec. 1983, was somehow doing so because to require such exhaustion prior to commencement of litigation would deny plaintiffs immediate access to judicial forums.

However, a more careful reading of the *Patsy* decision reveals that this Court engaged in a thorough analysis of Congressional intent on the exhaustion of administrative remedies issue, and after recognizing the obviously difficult questions concerning the design and scope of such an exhaustion requirement, concluded

> These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary in the context of diverse constitutional claims relating to thousands of different state agencies.

***Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 at 514.**

Similarly, in the instant case, the Wisconsin Supreme Court looked to the intent of the Wisconsin legislature in passing the most recent amendment to Sec. 893.80(1), Stats., whereby the scope of the notice of claim requirement was expanded to all causes of action. Having easily discerned to intent of the legislature, the court merely enunciated it. Thereafter, having determined that requiring compliance with Sec. 893.80(1), Stats., would not frustrate the federal policy underlying Sec. 1983, the court was properly able to rule as it did.

With respect to Petitioner's statute of limitations argument, it should be noted that while the Wisconsin Supreme Court was asked in this case to determine which Wisconsin statute of limitations was applicable to Sec. 1983 actions [A-5], in the light of this Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985), the court declined to do so, deciding the case on the notice of claim issue. Undoubtedly, the Wisconsin Supreme Court will be called upon, in some late case, to decide which statute of limitations will apply to all Sec. 1983 cases in Wisconsin. However, Sec. 893.80(1), Stats., is not a statute of limitations. It is a procedural notice of claim provision, one which any claimant should be able to comply with as easily as such claimant might be able to draft a Sec. 1983 pleading to file in court.

Petitioner appears to be arguing inconsistent positions, i.e., that a plaintiff should, on one hand, be allowed to immediately rush into state court with a Sec. 1983 action, and yet that the same plaintiff is unable to provide the municipality with the factual bases for his claim (notice of claim). Such a position defies logic.

This Court should recognize that Wisconsin's notice of claim requirement, as set forth in Sec. 893.80(1), Stats., is consistent with the principles developed by this Court in construing Sec. 1983, as discussed in this and earlier sections of this argument.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to review the judgment and opinion of the Wisconsin Supreme Court should be denied.

Respectfully submitted,

October, 1987

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(3)

No. 87-526

In The
Supreme Court of the United States
October Term, 1987

BOBBY FELDER,

Petitioner,

v.

DUANE CASEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

JOINT APPENDIX

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Petition for Certiorari filed September 22, 1987
Certiorari Granted November 9, 1987

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TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1982	
April 2	Filed, original summons and complaint.
May 17	Filed, letter extending time to answer.
June 7	Filed, Interrogatories. Filed, Notice of Deposition. Filed, Answer and Demand for Jury Trial.
July 2	Filed, scheduling order setting February 9, 1983, at 8:30 A.M. as pre-trial date.
1983	
Jan. 14	Filed, Notice of Motion. Filed, Plaintiff's January 1983, Motions, Affidavit In Support of Plaintiff's January 1983, Motions. Filed, Plaintiff's First Amended Complaint. Hearing on motions set for January 24, 1983, at 9:00 A.M.
Jan. 24	Hon. William A. Jennaro Presiding. Plaintiff in court by Attorney Curry First. Defendant in court by Attorney Rudolph Conrad. Parties stipulate that motions may be disposed of as follows: As to plaintiff's motion to compel discovery, defendant will pay to plaintiff the cost of the deposition. As to motion to amend complaint, defendant consents to same being amended. As to motion to modify pre-trial order, pre-trial cancelled and to be rescheduled when pleading completed.
Feb. 17	Filed, Order in conformity with decision of 1-24-83.
Mar. 25	Filed, Answer to Plaintiff's First Amended Complaint and Demand for Jury Trial. Action set for pre-trial conference on June 3, 1983, at 8:30 A.M. Cards sent.
Mar. 30	Filed, Demand for Jury Trial, fee paid.

DATE	PROCEEDINGS
June 3	Plaintiff present by Attorney Curry First. Defendant present by Attorney Rudolph Konrad. Action set for trial by jury on April 23, 1984, at 1:45 P.M. Filed, signed Scheduling Order.
Sept. 20	Filed, Notice of Motion and Motion to compel discovery and modify scheduling order.
Sept. 26	Hon. R. W. Landry Presiding Branch 6. Plaintiff in Court by Attorney Curry First. Defendants in Court by Attorney Rudolph M. Konrad, Assistant City Attorney, Statements by Counsel advising court of Stipulation entered into between counsel modifying the scheduling order, Court signs stipulation and order and matter adjourned to January 4, 1984 at 8:30 a.m. for a pretrial.
Oct. 14	FILED, Answers to Plaintiff's Second set of Interrogatories. Answers to Plaintiff's Second set of Interrogatories. Answers to Plaintiff's Second set of Interrogatories. Answers to Plaintiff's Second set of Interrogatories.
1984	
Jan. 4	Hon. R. W. Landry Presiding, branch 6. Plaintiff in Court by Attorney Curry First. Defendants in Court by Assistant City Attorney Rudy Conrad. Pre-trial held in chambers. Date of May 14, 1984 at 2:00 p.m. remains in effect as previously set.
Mar. 5	FILED, Notice of Motions. Plaintiff's Motion to Modify Scheduling Order and Amend Complaint. Plaintiff's Memorandum in Support

DATE	PROCEEDINGS
	of Motion to Modify Scheduling Order and Amend Complaint. Plaintiff's Second Amended Complaint.
Mar. 12	Hon. R. W. Landry Presiding, Branch 6. Plaintiff in Court by Attorney Curry First. Defendant in Court by Michael Whitcomb, Assistant City Attorney. Plaintiff's motion to amend complaint and modify scheduling order came on for hearing. Motion granted by the Court. Matter re-set to June 13, 1984 at 8:30 a.m. for a Scheduling Conference. Trial date of May 14, 1984 cancelled by the Court.
Mar. 23	FILED, Signed Order re-Motion of 3-12-84.
June 12	FILED, Answer to Second Amended Complaint.
June 13	Hon. Robert W. Landry Presiding. Plaintiff in Court by Attorney Curry First. Defendant by Assistant City Attorney Michael E. I. Whitcomb. Conference held in chambers. Action set for Jury trial on March 4, 1985 at 2:00 p.m. Signed Scheduling Order, received and filed. Copy of Order given to each counsel. (TWO WEEK TRIAL)
Nov. 14	FILED, Stipulation and Signed Order modifying Scheduling Order.
Jan. 23	FILED, Letter with Jury Demand Fee Paid $24.00.
Dec. 19	FILED, Stipulation and Signed Order modifying S/O.
1985	
Feb. 6	FILED, Plaintiff's List of Witnesses.

DATE PROCEEDINGS

Feb. 18 FILED, Plaintiff's Motion to Secure Individual, Sequestered Voir Dire outside the presence of the panel.
FILED, Notice of Motions.

Feb. 20 FILED, Defendants' Witnesses.

Feb. 25 FILED, Medical Records.

Mar. 1 FILED, Letter to Court dated 2-28-85.

Feb. 25 Hon. Robert W. Landry Presiding. E. P. Burns Court Reporter. Plaintiff in Court by Attorney Curry First and Barbara Zack Quindel. Defendants by Assistant City Attorney Reynold Scott Ritter. Plaintiff's Motions in Limine, Voire dire and defendant's motion to Dismiss came on for hearing. Motions argued and presented. Motions taken under advisement.

Mar. 4 Hon. Robert W. Landry Presiding. E. P. Burns Reporter. Plaintiff in Court in person and with Attorney Curry First and Barbara Zack Quindel. Defendants in Court in person and with Assistant City Attorney Reynold Scott Ritter. Statements by Counsel with reference to Court's Decision on Motions and further hearing on Motions in Limine proceeded. Court made its rulings. Defendant's motion to allow copies of depositions granted, Defendant's Motion for squestration of witnesses granted. Parties proceeded to impanel a jury including two alternates as follows, to-wit:
MARY E. SMITH, JAMES G. SIEBENALLER, SALOMON FLORES, THOMAS OMANN, JR. GREGORY M. DOBY, JEANINE M. WALKER, MARIANNE WICKMAN, CARL LEWIS, SARAH FIFER, MILDRED M. SCHILLING, EVA LOIS RICE, EMMA J. TORRANCE, DORIS J. WRIGHT, GERTRUDE HARRIS, fourteen good and lawful citizens of the City and County of Milwaukee,

DATE PROCEEDINGS

qualified to serve as jurors in the above entitled cause and who were duly impaneled and sworn; Jury excused and recess taken until 9:00 a.m. on March 5, 1985.

Mar. 5 Hon. Robert W. Landry Presiding. E. P. Burns Reporter. Plaintiff in Court in person and with Attorney Curry First and Barbara Zack Quindel. Defendants in court in person and with Assistant City Attorney Reynold Scott Ritter. Court's written decision on Motion to Dismiss read in open court. Statements by counsel. Jury in the box. Opening statement by Plaintiff counsel. Defendants' counsel reserves his opening statement. Trial proceeded: Sworn for the Plaintiff: Jack Cannon, Jr., Jury excused and recess taken until 2:00 p.m. same day.
LATER SAME DAY: All parties again in Court. Jury in the Box. Sworn for the plaintiff; Cyrinthia Harris, John Gardner, Marquis L. Harris, Deon Dawson. Jury excused and recess taken until 9:00 a.m. on March 6, 1985.

Mar. 6 Hon. Robert W. Landry Presiding. E. P. Burns Reporter. Plaintiff in Court in person and with Attorney Curry First and Barbara Zack Quindel. Defendants in Court in person and with Assistant City Attorney Reynold Scott Ritter. Statements by counsel with reference to Drs. Park and Jain depositions. Jury in the Box. Witness Deon Dawson resumes the Witness stand. Sworn for the Plaintiff: Thomas Mitchell, Judson Hansbough, Jury excused and recess taken until 2:00 p.m. same day.
LATER SAME DAY: All parties again in Court. Jury in the Box. Sworn for the Plaintiff: Sheila N. Felder, Bobby Felder. Jury excused and recess taken until 9:00 a.m. on March 7, 1985.

DATE PROCEEDINGS

Mar. 7 Hon. Robert W. Landry Presiding. E. P. Burns Reporter. Plaintiff in Court in person and with Attorney Curry First and Barbara Zack Quindel. Defendants in Court in person and Assistant City Attorney Reynold Scott Ritter. Jury in the Box. Witness Bobby Felder resumes the witness stand. In absence of the Jury, examination of witness continued by defendant Attorney. Jury in the Box. Sworn for the Plaintiff: Victor Hall, Detective Stanley Olson, adversely. Jury excused and recess taken until 1:45 p.m. same day.
LATER SAME DAY: All parties again in Court. Video deposition of Dr. Dharam P. Jain, M.D. viewed by the Jury. Recess Taken. Jury in the Box. Sworn for the Plaintiff, adversely: Police Officer Michael Kempfer, Police Officer Robert Conley, Police Officer Patrick Eaton, Jury excused and recess taken until March 8, 1985 at 9:00 a.m.

Mar. 8 Hon. Robert W. Landry Presiding. E. P. Burns Reporter. Plaintiff in Court in person and with Attorney Curry First and Barbara Zack Quindel. Defendants in Court in person and with Assistant City Attorney Reynold Scott Ritter. Jury in the Box. Sworn for the Plaintiff: Roy Nabors. In absence of the Jury examination of witness continues by the defense. Jury in the Box. Portions of depositions of Officers, Captain Duane Casey, Peter Pochowski, and Segments from the Milwaukee Police Department Rules and Regulations Manual read in open Court to the Jury. Plaintiff rests. Jury excused. Statement by Assistant City Attorney Reynold Scott Ritter with reference of his four motions to dismiss. Recess taken until 1:30 P.M. same day.
LATER SAME DAY: All parties again in Court. Jury excused and ordered to return

DATE PROCEEDINGS

March 11, 1985 at 9:30 A.M. Hearing on Defendants' Motions to Dismiss proceeded. Arguments by counsel. Motion No. 1, Denied. Motion No. 2 Taken under Advisement. Motion No. 3 Granted in Part and Denied in Part. Decisions as to Motion No. 4 adjourned to March 11, 1985 at 9:30 a.m.

Mar. 8 FILED, Court's Written Decision, motion of Feb. 25, 1985.

Mar. 11 Hon. Robert W. Landry Presiding. E. P. Burns Reporter. Plaintiff in Court in person and with Attorney Curry First and Barbara Zack Quindel. Defendants by Assistant City Attorney Reynold Scott Ritter. Plaintiff's Motion to Reconsider came on for hearing. Motion argued and presented. Motion denied by the Court. Continuation of defendant's Motion No. 4 of 4-8-85 to Dismiss as plaintiff has failed to present a prima facie case, proceeded. Motion argued and presented. Motion denied by the Court. Plaintiff moves for mistrial as to the last two defendants on the case. Motion argued. Motion denied by the Court. Plaintiff's motion to dismiss without prejudice, argued and denied. Plaintiff's motion to be held in contempt as he is withdrawing from the case and does not wish to proceed with the trial, Court examined co-counsel Barbara Zack Quindel. Court examines plaintiff Bobby Felder. Defendant's motion to dismiss with prejudice, granted by the Court. Jury in the Box and discharged.
FILED, Jury List, Exhibit List.

Mar. 15 FILED, Order for Judgment from City Attorney.

Mar. 19 FILED, Letter to Court from Attorney First Objection to Order, and requesting "HOLD" on City Attorney's Proposed order.

DATE	PROCEEDINGS
Mar. 22	FILED, Letter to Court from Attorney Quindel dated 3-21-85.
Mar. 29	FILED, 60 pages of transcript of proceedings had on 3-11-85. FILED, 54 pages of transcript of proceedings had on 3-8-85. FILED, 39 pages of transcript of proceedings had on 2-25-85.
April 9	FILED, Plaintiff's Post Trial Prejudgment Motions, Notice of Motions, Plaintiff's Memorandum in Support of Plaintiff's Proposed order for Judgment and Order for Judgment.
April 10	FILED, Signed Order for Judgment (City).
July 11	155—Entered IT IS ADJUDGED that the action of the plaintiff, Bobby Felder, is dismissed on the merits, and that the *defendants* Duane Casey, Patrick Eaton, Robert Farkas, Michael Kempfer, Gary Hoffman, Peter Pochowski, Robert Connolly, Edward Heideman, Stanley Olson and Roger Weber recover of said *plaintiff* the costs taxed at $2098.35. BY THE COURT, Gary J. Barczak, Clerk. Deputy Clerk (illegible).
April 30	Hon. Robert W. Landry Presiding. E. P. Burns Court Reporter. Plaintiff in Court in person and with Attorneys Curry First and Barbara Zack Quindel. Defendant by Assistant City Attorney Reynold Scott Ritter. Motion to re-consider came on for hearing. Motion argued and submitted. Motion denied by the Court. Further hearing set for May 1, 1985 at 9:00 a.m.
May 1	Hon. Robert W. Landry Presiding. E. P. Burns Court Reporter. Plaintiff in Court by Attorney Curry First. Defendant by Assistant City Attorney Reynold Scott Ritter. Conference held in chambers.

DATE	PROCEEDINGS
May 24	FILED, Signed Amended Order for Judgment.
July 16	FILED, Notice of Appeal.
July 17	Copy of Notice of Appeal and a copy of the Docket Entries transmitted to the Court of Appeals.
July 31	FILED, Notice of Cross-Appeal.
July 31	Copy of Notice of Cross-Appeal and a copy of the Docket Entries transmittted to the Court of Appeals.
Aug. 5	Original record transmitted to the Court of Appeals, by mail, last page 62.
Aug. 21	FILED, Amended Notice of Cross-Appeal.
Aug. 23	Supplemental record transmitted to the Court of Appeals, by mail, last page 65.
1987	
Aug. 26	FILED, ORDER of the Court of Appeals dated May 16, 1986 that those portions of the judgment entered July 11, 1985, dismissing Felder's federal civil rights claims against those eight defendants who were brought into the case by Felder's second amended complaint are summarily reversed, ETC.
Aug. 26	FILED, ORDER of the Supreme Court dated September 17, 1986 that the petition and cross-petition for review are granted, ETC.
Aug. 26	FILED, OPINIONS of the Supreme Court dated June 24, 1987.
Aug. 26	FILED, REMITTITUR of the Supreme Court dated August 3, 1987 that the decision of the Court of Appeals is reversed, and the cause is remanded to the Circuit Court with instructions.
Sept. 1	Hon. David V. Jennings, Jr. Presiding. Pursuant to directions of the Supreme Court, action dismissed.

STATE OF WISCONSIN
MILWAUKEE COUNTY

CIRCUIT COURT
BRANCH 30

BOBBY FELDER,

Plaintiff,

v.

MICHAEL KEMPFER, JOHN BAUER, JOSEPH HUSAR, GARY HOFFMAN, POLICE CHIEF HAROLD BREIER, CAPTAIN OF POLICE DUANE CASEY, DEPUTY INSPECTOR AND DIRECTOR OF POLICE ACADEMY LEONARD ZIOLKOWSKI, SERGEANT PATRICK EATON, SERGEANT ROBERT FARKAS, ROBERT CONNOLLY, EDWARD HEIDEMANN, PETER POCHOWSKI, STANLEY OLSEN, ROGER WEBER, and CITY OF MILWAUKEE,

Defendants.

Case No. 579-956

PLAINTIFF'S SECOND AMENDED COMPLAINT

(Filed March 8, 1984)

NOTE: This Second Amended Complaint supersedes the original Complaint filed April 2, 1982 and the subsequent First Amended Complaint.

INTRODUCTION

1. This civil rights police misconduct litigation is brought pursuant to the Civil Rights Act of 1870, 42 U.S.C. §§ 1983, 1985(2)(3) *et seq.* and the First, Fourth, Fifth, Sixth, Eighth, Thirteenth, and Fourteenth Amendments as well as Wisconsin statutory and common law torts. Jurisdiction is invoked under 28 U.S.C. § 1343. Claims are also asserted under the Wisconsin and United States Constitutions and specifically the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

PARTIES

Plaintiff

2. Plaintiff is an adult resident of Milwaukee, Wisconsin residing at 4060 North 15th Street.

Defendants

3. Defendant City of Milwaukee is a municipal entity within the State of Wisconsin and is organized and exists under laws of the State of Wisconsin and as a political subdivison of such. Defendant City of Milwaukee, during all relevant times, has been and is the employer of the individual police officers and officials listed in this action.

4. Defendants City of Milwaukee, Breier, Casey, Ziolkowski, Eaton, and Farkas are liable for the willful and wanton misconduct of their subordinate employees and agents and are sued as defendants for the employees and agents common law torts and constitutional and civil rights violations and through respondeat superior for the wrongful conduct of the City of Milwaukee public employees and agents and as subordinates of these supervisory individual defendant police officers.

5. Defendant City of Milwaukee at all times pertinent to this Complaint vested in individual defendants the authority of police officers and provided each of them with such official authority and these police officer individual

defendants engaged in conduct complained of in the name of and while acting as agents and employees for the defendant City of Milwaukee.

6. Defendant Chief Breier, during all relevant times, was the Chief of Police for the defendant City and its Police Department and as such was the highest ranking officer and employee for the Police Department. Defendant, Captain Casey, during all relevant times, was the commanding officer for the 5th District wherein the incident occurred and as such defendant Captain Casey was the highest ranking officer and employee for the Department within the 5th District. Defendant Director of Police Academy Ziolkowski, during all relevant times, was the commanding officer of the Police Academy and as such was the highest ranking officer and employee at the Academy for the Police Department.

7. Individual defendants at all times relevant to the subject matter of this action were duly appointed and qualified law enforcement officers with the defendant City of Milwaukee and in doing the acts and things hereinafter set forth, the defendants were acting in their respective capacity as stated and acting under color of statutes, ordinances, regulations, custom, policy, and usage of the State of Wisconsin and the City of Milwaukee.

8. Each of the individual defendants have acted under color of law in depriving the plaintiff of his rights under the Constitutions of the United States and State of Wisconsin and such acts have caused, and will in the future continue to cause, plaintiff to suffer irreparable harm and damage and injury.

9. At all times herein mentioned, individual defendants and each of them acted in bad faith and with malice and in derogation of their duties and contrary to the Constitutions and laws and regulations and ordinances of the United States, State of Wisconsin, and City of Milwaukee.

10. All individual defendants are white or Caucasion and all defendants are sued in their individual and official capacities.

FACTS

11. On July 4, 1981 in the City of Milwaukee, Milwaukee Police Department Squad 717, containing defendants Olsen and Weber, and Squad 709, containing defendants Connolly, Pochowski, and Heidemann, were dispatched at or shortly after 9:00 p.m. to the 4000 block of North 15th Street respecting a complaint, "man with a gun", and a family trouble complaint at 4046 North 15th Street.

12. During all relevant times these five defendants—Olsen, Weber, Connolly, Pochowski, and Heidemann—were members of the defendant City of Milwaukee Tactical Enforcement Unit aka Tac Squad, aka 700 Squad.

13. At or about this same time period Squad 57, containing defendants Kempfer and Hoffman, and Squad 55, containing defendants Husar and Bauer, were dispatched to the same vicinity under generally the same circumstances.

14. At or shortly after 9:00 p.m. plaintiff, at or near his residence at 4060 North 15th Street, was briefly stopped and detained by defendants Husar and Bauer. Shortly

thereafter a black female informed those two defendants that plaintiff was a "wrong person".

15. Thereafter defendants Connolly, Pochowski, Heideman, Kempfer, Olsen, and Weber, without any provocation from plaintiff, assaulted and battered plaintiff by the use of Police Department night sticks or similar weapon, fists, and other physical force by those defendants against plaintiff. The force against plaintiff resulted in plaintiff being restrained, battered, handcuffed behind his back, thrown to the ground, and beaten until plaintiff was lying unconscious or semi-conscious, face down, on the ground. Thereafter three or more individual defendants dragged plaintiff to a Milwaukee police van and in so dragging plaintiff, deliberately held his body so that plaintiff's face was dragging on the ground and thereafter these defendants threw plaintiff into the police van head first.

16. During the defendants beating of plaintiff, numerous individual defendants confronted a gathering and large crowd of black adult residents of the City of Milwaukee in that immediate neighborhood and threatened one or more of those individuals verbally, including racial epitaphs such as "niggers", and the pointed display of a Milwaukee Police Department rifle.

17. During the incident defendant Hoffman arrested a neighbor and friend of plaintiff, Marquis Harris, of 4046 North 15th Street, Milwaukee, an arrest lacking probable cause and justification.

18. After plaintiff's arrest he was taken in a defendant City of Milwaukee van to the 5th District where defendant was processed, booked, and held in custody.

19. At the 5th District all defendants in Squads 709 and 717 returned at about the time plaintiff arrived and, in addition, defendant Kempfer wrote the municipal ordinance citation against plaintiff indicating plantiff was in violation of the defendant City of Milwaukee ordinance of disorderly conduct.

20. At that time, at the 5th District, there was some confusion about what crime, if any, plaintiff had committed and which police officer defendant had witnesses such. Defendant Kempfer told defendant Sergeant Eaton that Kempfer had personally observed plaintiff in violation of the ordinance, disorderly conduct, and as a result defendant Kempfer wrote the citation.

21. This conduct by defendant Kempfer was taken wrongfully and maliciously by Kempfer and based on the race, black, of plaintiff. This conduct by defendant Kempfer was the commencement of a wrongful conspiracy to cover up the willful and wrongful use of excessive force and unlawful arrest by individual defendants against plaintiff. All individual defendants at the scene were personally aware that plaintiff was not in violation of any law or ordinance.

22. Further, individual defendants at the scene on July 4, 1981 were personally aware that at no time did plaintiff strike or attempt to strike any defendants nor did plaintiff at any time resist or hinder in any manner any legitimate law enforcement practice.

23. Further, at the scene, all individual defendants had the opportunity and legal duty to intervene to restrain other police officer defendants who were, in violation of the law, using excessive force against plaintiff. Those in-

dividual defendant police officers at the scene, in violation of their duty, nevertheless took no action, either psysical or verbal, to stop the illegal beating by defendants against plaintiff.

24. Plaintiff at no time committed, nor was committing, any offense against ordinances of the City of Milwaukee or County of Milwaukee or laws of the State of Wisconsin.

25. As a result of the excessive force rendered by defendants against plaintiff, plaintiff was required to receive medical treatment several hours after his beating at Columbia Hospital.

26. As a result of the unlawful beating by defendants, plaintiff suffered multiple bruises and abrasions to his body, including head, causing damage and injury and pain to his body including his head, eyes, teeth, and back. In addition, plaintiff incurred headaches and back pains.

27. Plaintiff's injuries are continuing and have continued through this date and plaintiff has not received medical assurance that such injuries will be other than permanent.

28. While detained and arrested at the 5th District station, plaintiff was denied the request to make a telephone call and was arrested and held in custody for approximately six hours. Plaintiff was only released upon paying $84 as bail.

29. After the incident late in the evening of July 4, 1981, or early the next morning, Milwaukee Common Council Alderman Roy Nabors, made a telephone call complaint respecting the mistreatment of plaintiff to the 5th District.

Thereafter defendants Sergeants Farkas and Eaton were dispatched to the scene immediately and commenced, that evening or early morning, an investigation which included talking to numerous witnesses of the incident.

30. The investigation by those two defendant sergeants, and other officers with the defendant City of Milwaukee, continued for several days or weeks thereafter and included defendants and Milwaukee police officers taking personal statements from 10 or more civilian witnesses. All of those statements from civilian witnesses indicated two or more defendants engaged in wrongful and excessive use of force against plaintiff.

31. Nevertheless, at no time did the defendant City of Milwaukee or any supervisory officer defendants give any merit or credit to any of those statements memorialized in writing by civilians to police officers and the failure so to do constituted a further specific act in the conspiracy by the defendants to cover up the wrongful conduct by defendants against plaintiff.

32. The civilian witnesses interviewed and questioned by Milwaukee police officers included Bob Hansbrough, Sheila Felder, Don Dawson, Deon Dawson, Dorothy Cannon, Victor Hill, Judson Hansbrough, John Gardner, Sr., Jack Cannon, Thomas Mitchell, and Cynthia Jeffers.

33. Further acts in the conspiracy that was taken wrongfully and intentionally and maliciously against plaintiff and based in whole or in part on the race, black, of plaintiff, include, but are not limited to, the following:

(i) all nonsupervisory individual police officer defendants prepared written reports styled MPD

"Matters of" which falsely stated personal observations of the defendants preparing the reports;

(ii) defendant Sergeant Farkas prepared one or more Matters of including a statement after he interviewed plaintiff and which Matter of was false in material respects;

(iii) defendant Sergeant Eaton prepared one or more Matters of which were false in material respects including a final summary of the case Matter of which defendant Sergeant Eaton submitted to defendant Captain Casey;

(iv) upon receipt of the aforesaid Matter of and the other Matters of and entire investigatory file in this case, defendant Captain Casey deliberately, as a further act of the conspiracy, on information and belief, failed to:

(a) request the defendant City of Milwaukee Police Department Bureau of Internal Affairs assume jurisdiction over the complaint and file based on the discrepancies in the reports and based on the consistent and cumulative civilian statements which should have been given credit and merit;

(b) request the defendant City of Milwaukee Police Department, Police Chief Harold Breier, assume jurisdiction over the complaint and file based on the discrepancies in the reports and based on the consistent and cumulative civilian statements which should have been given credit and merit; and

(c) request the defendant County of Milwaukee Office of District Attorney and/or Wisconsin Department of Justice and/or United States Department of Justice assume jurisdiction over the complaint and file based on the discrepancies in the reports and based on the consistent

and cumulative civilian statements which should have been given credit and merit.

(v) at no time, as a further act of the on-going conspiracy, did any individual defendants who personally observed the incident on July 4, 1981 bring the matter to the attention of any supervisory officer or district attorney in the context of reporting accurately the fact that several individual police officers wrongfully used excessive force against plaintiff and in so doing violated the criminal laws of the State of Wisconsin and the United States;

(vi) as a further act in the conspiracy defendant Sergeant Eaton interviewed plaintiff's spouse, Sheila Felder, and failed to summarize that conversation in his memorandum book; and

(vii) as a further act in the conspiracy defendant Sergeant Eaton received a Matter of from City of Milwaukee police officer Brian Suttle and which report accurately described his observations including mistreatment by police officers against plaintiff and as a result defendant Sergeant Eaton had police officer Suttle's Matter of destroyed and ordered police officer Suttle to prepare a different matter of.

34. On January 12, 1982 the City Ordinance, disorderly conduct, citation against plaintiff was dismissed by action taken by Milwaukee City Attorney's Office.

35. The race of plaintiff is black and the actions taken by defendants against plaintiff were, in whole or in part, based upon said race of plaintiff.

36. The activities of the defendants were wrongful in other respects recognizing:

(i) defendants at no time attempted to identify plaintiff as the appropriate object of their activities and, in fact, ignored the specific objections to the po-

lice activity against plaintiff from observers who indicated to the police plaintiff was the "wrong person";

(ii) defendants did not have an arrest warrant in their possession;

(iii) at no time did defendants tell plaintiff the reason for their actions against plaintiff despite his inquiry.

37. In 1972 the United States Court of Appeals for the Seventh Circuit in *Byrd v. Brishke*, 466 F.2d 6, held generally police officers have a constitutional duty to affirmatively intervene to restrain and stop a fellow police officer who is engaged in the excessive and unlawful use of force. With actual or constructive knowledge of that appeal decision and its progeny, including numerous Seventh Circuit cases following *Byrd* after 1972, nevertheless defendants Chief Breier, Captain Casey, and Director of Police Academy Ziolkowski failed to ever set in motion a training program or any training so that a Milwauke police officer would be aware of his or her responsibility and duty when such police officer personally observed a fellow police officer engaged in the excessive and unlawful use of force against a civilian.

38. Further, these three defendants, Breier, Ziolkowski, and Casey, failed to instruct individual police officers and all Milwaukee police officers on this issue from 1972 through the present and as such this failure to train on this issue became the established policy and custom of the defendant City of Milwaukee and its Police Department.

39. Further, as far back as 1973 in *Ford v. Breier*, #73-C-65, United States District Court, Eastern District of Wisconsin, 383 F.Supp. 505 these three supervisory de-

fendants have had actual or constructive knowledge that a "failure to train" could constitutionally subject them to liability under federal law and those defendants, nevertheless, failed to take the required affirmative actions respecting training in this regard.

40. Further, as far back as 1976 or earlier in *McKee v. Breier*, United States District Court, Eastern District of Wisconsin, 417 F.Supp. 189 these three defendants had constructive or actual notice that a "failure to train", whether negligent or intentional, could subject them to liability for a constitutional violation.

41. Further, as to the conspiracy to cover up the wrongful beating by individual defendants of plaintiff, further conspiratorial steps were taken but, on information and belief, those have been to date successfully concealed from plaintiff.

42. As to the conspiracy by defendants against plaintiff, it was taken by two or more individual defendants acting in concert and included the unlawful acts cited and further constituted an agreement between those defendants to inflict a wrong and injury on plaintiff and which has, in fact, injured and damaged plaintiff; and, further, that those participants in the conspiracy shared in the cover up, based on race, which was the general object of the conspiracy; and, finally that the essential nature of the conspiracy was known to the defendants and conspirators.

43. As part of the conspiracy supervisory defendants Breier and Casey, pursuant to the defendant City of Milwaukee Police Department Rules and Regulations, had direct communication respecting this case in general and

on information and belief the Complaint from Alderman Nabors in particular as evidenced in part by MPD Rules and Regulations; Rule 2, Section 3; Rule 3, Section 2; Rule 4, Section 3, 7, 10, 21, 22, 31, 44, 61; Rule 7, Section 1, 4, 5, 6, 41.

44. Further, the destruction of the Matter of by defendant Sergeant Eaton was in violation of Rule 4, Section 45, 58, 61, 76, and 77.

45. The actions of defendants constitute intentional and malicious violations by those defendants, jointly and severally, of plaintiff's Fourteenth Amendment rights only to be arrested and restrained upon the presence of probable cause and constitute violations by the defendants of 42 U.S.C. § 1983.

46. The actions of defendants constitute intentional and malicious violations by the defendants, jointly and severally, of the plaintiff's Wisconsin constitutional rights to be arrested and restrained only upon the presence of probable cause and constitute violations by the defendants of the Wisconsin Constitution and Wisconsin Statutes.

47. The actions of defendants constitute intentional and malicious violations by these defendants, jointly and severally, of plaintiff's Fourteenth Amendment rights to be free from unlawful, unreasonable, excessive, and improper force and violations by these defendants of 42 U.S.C. § 1983.

48. The defendants also conspired under 42 U.S.C. § 1985 in that they attempted and were successful in having plaintiff charged with a city ordinance violation of disorderly conduct under circumstances wherein defendants were aware plaintiff was not in fact, at any time, disorderly. Rather defendants attempted to have such charges presented and a resulting conviction so it would cover up the unlawful activities of defendants and act as a pretext for their unlawful beating of plaintiff.

49. Respecting the failure to train issues because the highest-ranking officials with the defendant City of Milwaukee are constitutionally liable and because the failure to train on those issues has occurred over a passage of decades, it has become the custom and policy of the defendant City of Milwaukee.

50. As to all claims against all individual defendants, plaintiff is independently, jointly and severally, claiming statutory indemnification under sec. 895.46 *et seq.* Stats. so that defendant City of Milwaukee does indemnify any and all judgments.

CAUSES OF ACTION

51. With respect to all causes of action set forth below, plaintiff incorporates the allegations contained in ¶s 1 through and including number 50 of this Complaint.

52. As a direct and approximate result of the actions of defendants set forth herein, plaintiff has been injured in his employment feelings, enjoyment of life, and victimized based on plaintiff's race, black.

53. The conduct of defendants described herein deprive plaintiff of his rights under the United States and Wisconsin Constitutions including plaintiff's right not to be deprived of liberty without due process of law, his right not to be arrested and restrained without warrant or probable cause, and his right not to be arbitrarily and un-

lawfully beaten, assaulted, and injured. As a direct result, plaintiff was falsely and unlawfully restrained and held, which caused plaintiff fear, distress, humiliation, and degradation.

54. Some or all of the defendants as described above met from time to time and planned, agreed, and conspired together with the purpose of and intent to use their official position to deprive plaintiff of due process of law and of equal protection of the laws. The planning and agreement and conspiracy was in fact undertaken, effectuated, and accomplished its purpose previously described.

55. The planning, agreement, and conspiracy was intended to and did injure plaintiff by reason of his race, black, and denied plaintiff equal protection of law including, but not limited to, plaintiff's rights under 42 U.S.C. §§ 1985(2) and (3).

56. Defendant City of Milwaukee and supervisory defendants Breier and Ziolkowski did fail to properly supervise these defendants in employment and failed to property train them with respect to the constitutional and statutory duty of police officers to intervene and prevent the commencement of or continuation of an unlawful beating by a fellow police officer employee directed against a civilian.

57. The use of excessive force, false arrest, and false imprisonment also violates plaintiff's rights in this regard under the Wisconsin Constitution, Wisconsin Statutes, and Wisconsin common law.

58. Further, the bringing of charges against plaintiff for disorderly conduct violated plaintiff's right to be free

from the bringing of false charges as part of a cover up and free from malicious prosecution and abuse maliciously of process.

59. The force used against plaintiff by defendants constituted the unconstitutional use of deadly force in that the force used was extreme and potentially deadly in circumstances wherein plaintiff had not committed a felony and in circumstances wherein plaintiff did not endanger any human life.

REMEDIES

WHEREFORE, plaintiff makes demand for the following:

1. Pursuant to 42 U.S.C. §§ 1983 *et seq.* the United States and Wisconsin Constitutions, the statutory and common law of the State of Wisconsin, the federal and state law of damages:

> (i) compensatory damages for actual injuries including, but not limited to, future loss and injury due to medical injuries and victimization by reason of race, against defendants, jointly and severally, in the amount of $800,000.00 to compensate plaintiff for the damages and injuries; and
>
> (ii) punitive damages in the amount of $1.5 Million due to the malice of the defendants and in order to vindicate the primacy of the rights violated and in order to deter future similar violations, as to defendants jointly and severally.

2. All costs of this action including reasonable attorney's fees pursuant to 42 U.S.C. § 1988.

3. Such further equitable and legal relief as the Court may deem necessary.

Dated at Milwaukee, Wisconsin this 8th day of March 1984.

/s/ Curry First
CURRY FIRST
Perry, First, Reiher, Lerner & Quindel, s.c.
1219 North Cass Street
Milwaukee, WI 53202

Attorney for Plaintiff

STATE OF WISCONSIN CIRCUIT COURT

MILWAUKEE COUNTY

BOBBY FELDER,

Plaintiff,

v.

MICHAEL KEMPFER, JOHN BAUER, JOSEPH HUSAR, GARY HOFFMAN, POLICE CHIEF HAROLD BREIER, CAPTAIN OF POLICE DUANE CASEY, DEPUTY INSPECTOR AND DIRECTOR OF POLICE ACADEMY LEONARD ZIOLKOWSKI, SERGEANT PATRICK EATON, SERGEANT ROBERT FARKAS, ROBERT CONNOLLY, EDWARD HEIDEMANN, PETER POCHOWSKI, STANLEY OLSEN, ROGER WEBER, and CITY OF MILWAUKEE,

Defendants.

ANSWER TO SECOND AMENDED COMPLAINT

Case No. 579-956

(Filed June 12, 1984)

NOW COME the defendants by their attorneys, Grant F. Langley, City Attorney, and Michael A.I. Whitcomb, Assistant City Attorney, and as and for an answer to the second amended complaint, allege and show to the court as follows:

1. Answering paragraph 1 of the second amended complaint, the defendants deny the same.

2. Answering paragraph 2 of the second amended complaint, the defendants admit the same.

3. Answering paragraph 3 of the second amended complaint, the defendants admit the same.

4. Answering paragraph 4 of the second amended complaint, the defendants deny the same.

5. Answering paragraph 5 of the second amended complaint, the defendants deny the same.

6. Answering paragraph 6 of the second amended complaint, the defendants admit the same.

7. Answering paragraph 7 of the second amended complaint, the defendants allege that paragraph 7 states legal conclusions only.

8. Answering paragraph 8 of the second amended complaint, the defendants deny the same.

9. Answering paragraph 9 of the second amended complaint, the defendants deny the same.

10. Answering paragraph 10 of the second amended complaint, the defendants admit that all individual defendants are white or Caucasian; as to the remaining allegations contained in paragraph 10 of the second amended complaint, the defendants deny the same.

11. Answering paragraph 11 of the second amended complaint, the defendants admit that on July 4, 1981 in the City of Milwaukee, Milwaukee Police Department Squad 717, containing defendants Olsen and Weber, and Squad 709, containing defendants Connolly, Pochowski, and Heidemann, were dispatched at or shortly after 9:00 p.m. to the 4000 block of N. 15th Street respecting a complaint, "man with a gun"; as to the other allegations contained in paragraph 11 of the second amended complaint,

the defendants are without information sufficient to form a belief as to the truth of the matters contained therein and therefore deny the same.

12. Answering paragraph 12 of the second amended complaint, the defendants admit the same.

13. Answering paragraph 13 of the second amended complaint, the defendants admit that on July 4, 1981 at approximately 9:00 p.m. Squad 57, containing defendants Kempfer and Hoffman, was dispatched to the alley of the 4000 block of N. 14th Street regarding a man holding a gun on another man possibly related to family trouble at 4046 N. 15th Street; the defendants further admit that on July 4, 1981 at approximately 9:00 p.m. Squad 55 containing defendants Husar and Bauer was dispatched to the alley in the 4000 block of N. 15th Street regarding a man with a gun which may have been related to a family trouble complaint at 4146 N. 14th Street; as to the other allegations contained in paragraph 13 of the second amended complaint, the defendants are without information sufficient to form a belief as to the truth of the matters contained therein and therefore deny the same.

14. Answering paragraph 14 of the second amended complaint, the defendants admit that at or shortly after 9:00 p.m. the plaintiff was observed leaving the residence located at 4046 N. 15th Street and was interviewed by defendants Husar and Bauer. During the interview other individuals stated that the plaintiff was not involved in the incident at 4046 N. 15th Street; as to the other allegations contained in paragraph 14 of the second amended complaint, the defendants are without information suffi-

cient to form a belief as to the truth of the matters contained therein and therefore deny the same.

15. Answering paragraph 15 of the second amended complaint, the defendants deny the same.

16. Answering paragraph 16 of the second amended complaint, the defendants admit that a large crowd had gathered and that a police officer in the vicinity was in possession of a Milwaukee Police Department rifle; as to the other allegations contained in paragraph 16 of the second amended complaint, the defendants are without information sufficient to form a belief as to the truth of the matters contained therein and therefore deny the same.

17. Answering paragraph 17 of the second amended complaint, the defendants deny the same.

18. Answering paragraph 18 of the second amended complaint, the defendants admit the same.

19. Answering paragraph 19 of the second amended complaint, the defendants admit that defendant Kempfer wrote a municipal ordinance citation against the plaintiff indicating plaintiff was in violation of the defendant City of Milwaukee's ordinance prohibiting disorderly conduct; as to the other allegations contained in paragraph 19 of the second amended complaint, the defendants deny the same.

20. Answering paragraph 20 of the second amended complaint, the defendants admit that defendant Kempfer conferred with Sergeant Eaton and thereafter defendant Kempfer issued a citation to the plaintiff for disorderly conduct based upon his personal observations and information received from other officers; as to the other allegations contained in paragraph 20 of the second amended complaint, the defendants deny the same.

21. Answering paragraph 21 of the second amended complaint, the defendants deny the same.

22. Answering paragraph 22 of the second amended complaint, the defendants deny the same.

23. Answering paragraph 23 of the second amended complaint, the defendants deny the same.

24. Answering paragraph 24 of the second amended complaint, the defendants deny the same.

25. Answering paragraph 25 of the second amended complaint, the defendants deny the same.

26. Answering paragraph 26 of the second amended complaint, the defendants deny the same.

27. Answering paragraph 27 of the second amended complaint, the defendants are without information sufficient to form a belief as to the truth of the matters contained therein and therefore deny the same.

28. Answering paragraph 28 of the second amended complaint, the defendants deny the same.

29. Answering paragraph 29 of the second amended complaint, the defendants admit that Sergeants Farkas and Eaton conducted an investigation regarding the incident; as to the other allegations contained in paragraph 29 of the second amended complaint, the defendants are without information sufficient to form a belief as to the truth of the matters stated therein and therefore deny the same.

30. Answering paragraph 30 of the second amended complaint, the defendants admit that an investigation was conducted by Sergeants Farkas and Eaton relative to the incident which included numerous interviews with civilian witnesses; as to the other allegations contained in paragraph 30 of the second amended complaint, the defendants deny the same.

31. Answering paragraph 31 of the second amended complaint, the defendants deny the same.

32. Answering paragraph 32 of the second amended complaint, the defendants admit the same.

33. Answering paragraph 33 of the second amended complaint, the defendants deny the same.

34. Answering paragraph 34 of the second amended complaint, the defendants admit that on or about January 12, 1982, the disorderly conduct citation issued to the plaintiff was dismissed upon the motion of the City of Milwaukee.

35. Answering paragraph 35 of the second amended complaint, the defendants deny the same.

36. Answering paragraph 36 of the second amended complaint, the defendants deny the same.

37. Answering paragraph 37 of the second amended complaint, the defendants deny the same.

38. Answering paragraph 38 of the second amended complaint, the defendants deny the same.

39. Answering paragraph 39 of the second amended complaint, the defendants deny the same.

40. Answering paragraph 40 of the second amended complaint, the defendants deny the same.

41. Answering paragraph 41 of the second amended complaint, the defendants deny the same.

42. Answering paragraph 42 of the second amended complaint, the defendants deny the same.

43. Answering paragraph 43 of the second amended complaint, the defendants deny the same.

44. Answering paragraph 44 of the second amended complaint, the defendants deny the same.

45. Answering paragraph 45 of the second amended complaint, the defendants deny the same.

46. Answering paragraph 46 of the second amended complaint, the defendants deny the same.

47. Answering paragraph 47 of the second amended complaint, the defendants deny the same.

48. Answering paragraph 48 of the second amended complaint, the defendants deny the same.

49. Answering paragraph 49 of the second amended complaint, the defendants deny the same.

50. Answering paragraph 50 of the second amended complaint, the defendants deny the same.

51. Answering paragraph 51 of the second amended complaint, the defendants incorporate by reference the answers to paragraphs 1-51 of this answer to the second amended complaint.

52. Answering paragraph 52 of the second amended complaint, the defendants deny the same.

53. Answering paragraph 53 of the second amended complaint, the defendants deny the same.

54. Answering paragraph 54 of the second amended complaint, the defendants deny the same.

55. Answering paragraph 55 of the second amended complaint, the defendants deny the same.

56. Answering paragraph 56 of the second amended complaint, the defendants deny the same.

57. Answering paragraph 57 of the second amended complaint, the defendants deny the same.

58. Answering paragraph 58 of the second amended complaint, the defendants deny the same.

59. Answering paragraph 59 of the second amended complaint, the defendants deny the same.

NOW COME the defendants by their attorneys, Grant F. Langley, City Attorney, and Michael A. I. Whitcomb, Assistant City Attorney, and by way of affirmative defenses allege and show to the court as follows:

60. All acts done and actions taken by the defendants were done or taken in good faith.

61. The plaintiff has failed to state a claim against any of the defendants under 42 U.S.C. § 1983 upon which relief may be granted.

62. The plaintiff has failed to state a claim against any of the defendants under 42 U.S.C. § 1985 upon which relief may be granted.

63. The plaintiff has failed to state a claim against any of the defendants under 42 U.S.C. § 1985 cognizable under state law.

64. The plaintiff has failed to state a claim against any of the defendants for malicious prosecution.

65. The plaintiff has failed to state a claim against the City of Milwaukee upon which relief may be granted.

66. The plaintiff alleged claims against Police Chief Harold Breier, Captain of Police Duane Casey, Deputy Inspector and Director of Police Academy Leonard Ziolkowski, Sergeant Patrick Eaton, Sergeant Robert Farkas, Robert Connolly, Edward Heidemann, Peter Pochowski, Stanley Olsen, Robert Weber, and the City of Milwaukee are barred by the statute of limitations.

67. All acts done by the defendants were done in full compliance with the law.

68. The plaintiff has failed to comply witth the provisions of sec. 893.80, Stats.

69. At the time of plaintiff's arrest, probable cause existed for his arrest for violating the laws of the State of Wisconsin and the ordinance of the City of Milwaukee prohibiting a person from engaging in disorderly conduct.

70. Any force used by the defendants in effectuating the arrest of the plaintiff was reasonably necessary under the circumstances.

NOW, THEREFORE, the defendants demand judgment against the plaintiff as follows:

1. That the complaint be dismissed on its merits.

2. For costs and disbursements.

3. For any further relief the court deems just and equitable.

Dated at Milwaukee, Wisconsin, this 12th day of June, 1984.

GRANT F. LANGLEY
City Attorney

/s/ Michael A. I. Whitcomb
Assistant City Attorney
Attorney for defendants

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No. 87-526

In The
Supreme Court of the United States
October Term, 1987

BOBBY FELDER,
Petitioner,

v.

DUANE CASEY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

BRIEF FOR PETITIONER

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December 1987

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QUESTION PRESENTED

Whether states may condition access to their courts in actions brought under 42 U.S.C. § 1983 by requiring plaintiffs to comply with state notice of claim statutes?

PARTIES

The petitioner in this Court is Bobby Felder, who was the plaintiff in the proceedings below. Respondents are Duane Casey, Patrick Eaton, Robert Farkas, Peter Pochowski, Robert Connolly, Edward Heideman, Stanley Olsen, Roger Weber, Michael Kempfer, and Gary Hoffman.

TABLE OF CONTENTS

TABLE OF CONTENTS—(Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—(Continued)

TABLE OF AUTHORITIES—(Continued)

TABLE OF AUTHORITIES—(Continued)

TABLE OF AUTHORITIES—(Continued)

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TABLE OF AUTHORITIES—(Continued)

TABLE OF AUTHORITIES—(Continued)

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court reversing the Court of Appeals is reported at 139 Wis.2d 614, 408 N.W.2d 19 (1987), and is reprinted at pp. A-1 to A-20 of the Appendix to the Petition for Certiorari.

The opinion of the Wisconsin Court of Appeals, dated April 24, 1986, is unreported but is reprinted at pp. A-21 to A-24 of the Appendix to the Petition for Certiorari.

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JURISDICTION

The Wisconsin Supreme Court issued its opinion on June 24, 1987, reversing the decision of the Wisconsin Court of Appeals and remanding the case to the Milwaukee County Circuit Court with instructions to dismiss the action. The Petition for Certiorari was filed on September 22, 1987, and granted on November 9, 1987.

The jurisdiction of this Court to review the opinion and judgment of the Wisconsin Supreme Court is invoked under 28 U.S.C. § 1257(3).

—o—

STATUTES INVOLVED

This case involves the following statutes, the relevant portions of which provide:

42 U.S.C. § 1983 (1982)

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988 (1982)

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Wis.Stat.Ann., § 893.80 (West 1983 & Supp. 1986)

§ 893.80 Claims against governmental bodies or officers, agents or employes; notice of injury; limitation of damages and suits.

(1) Except [with respect to medical malpractice claims] as provided in sub. (1m), no action may be brought or maintained against any . . . governmental subdivision or agency thereof nor against any officer, official, agent or employe of the . . . subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

(a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the . . . governmental subdivision or agency and on the officer, official, agent, or employe under s.801.11. Failure to give the requisite notice shall not bar action on the claim if the . . . subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant . . . subdivision or agency or to the defendant officer, official, agent or employe; and

(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant . . . subdivision or agency and the claim is disallowed. Failure of the appropriate body to disallow within 120 days after presentation is a disallowance. Notice of disallowance shall be served on the claimant . . . No action on a claim against any defendant . . . subdivision or agency nor against any defendant officer, official, agent or employe, may be brought after 6 months from the date of service of the notice, and the notice shall contain a statement to that effect.

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STATEMENT OF THE CASE

In the early evening of Independence Day, July 4, 1981, and in the presence of his wife, children, and neighbors, (A-18)[1] Bobby Felder was stopped for questioning by Milwaukee police officers outside his home in Milwaukee, Wisconsin. The police officers were combing the

[1]In this Brief, references to the Appendix to the Petition for Certiorari, which contains the decisions of the Wisconsin appellate courts, are indicated by "A—." References to the Joint Appendix are indicated by "J.A. —." References to the transcripts of the non-evidentiary hearings before the trial court are indicated by "Tr. —."

neighborhood and were looking for an armed individual who was reported to be in the area and who was later apprehended and arrested. (A-3)

According to police reports, Felder was not cooperative and began to shout profanities, thereby attracting neighborhood attention. Felder's neighbors, however, successfully intervened and exonerated him, and the police reportedly told Felder to go home. Felder, allegedly, continued to be loud and abusive and reportedly pushed an officer. (A-3)

Minutes later, members of the Milwaukee Police Department Tactical Enforcement Unit arrived and arrested Felder for disorderly conduct. At this point, the police officers, including members of the Tactical Enforcement Unit, beat Felder with batons, carried him to a paddy wagon while he was partially unconscious, and threw him through the air and into the paddy wagon. (A-3)

In his complaint, Felder alleged that several of the defendant police officers,

> without any provocation from plaintiff, assaulted and battered plaintiff by the use of Police Department night sticks or similar weapon, fists, and other physical force by those defendants against plaintiff. The force against plaintiff resulted in plaintiff being restrained, battered, handcuffed behind his back, thrown to the ground, and beaten until plaintiff was lying unconscious or semi-conscious, face down, on the ground. Thereafter three or more individual defendants dragged plaintiff to a Milwaukee police van and in so dragging plaintiff, deliberately held his body so that plaintiff's face was dragging on the ground and thereafter these defendants threw plaintiff into the police van head first.

Plaintiff's Second Amended Complaint, para. 15 (J.A. 15).

Felder was charged with a municipal (civil) ordinance violation of disorderly conduct, but the Milwaukee City Attorney subsequently dropped the charge. (A-3; A-22)

Felder is black and all the police officers present at the scene are white. (A-3) Felder alleged that the deffendants' conduct, including their attempt to cover up their unlawful conduct by falsely charging him with having violated the law, was racially motivated. *See* Plaintiff's Second Amended Complaint, paras. 10, 21, 33, 35, 52 and 55. (J.A. 13, 15, 17, 18, 23, and 24)

Within hours of the July 4, 1981 incident, Milwaukee Common Council Alderman Roy Nabors made a telephone complaint which concerned the alleged mistreatment of Felder and which resulted in an immediate investigation of the incident. In that investigation, Milwaukee police officers took statements from at least ten civilian witnesses who confirmed that plaintiff Felder had been subjected to wrongful and excessive use of force. Plaintiff's Second Amended Complaint, para. 29, 30. (J.A. 16, 17) In addition, Alderman Nabors sent Police Chief Harold Breier a letter in which he included a number of witness statements and personally informed Chief Breier of the incident. (A-13) *See* Ex. 35.

On April 2, 1982, less than nine months after his arrest, Felder filed in the Milwaukee County Circuit Court this § 1983 damage action against one known Milwaukee police officer, respondent Kempfer, and unknown officers identified as John Doe. On January 14, 1983, Felder filed a First Amended Complaint renaming respondent Kempfer and adding respondent Hoffman and two additional Milwaukee police officers as defendants. (J.A. 1) On March 8, 1984, Felder filed a Second Amended Complaint renaming the four police officers and adding eleven new defendants. (J.A. 1, 10-26)

This action was filed under § 1983[2] and alleged violations of rights secured by various amendments to the

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[2]Felder also included a claim based on 42 U.S.C. § 1985(2) (1982) in which he alleged a racially-motivated conspiracy to

(Continued on following page)

United States Constitution, including the fourth and the fourteenth, as well as state law tort and conspiracy claims. Plaintiff's Second Amended Complaint, paras. 1, 45, 47, 53, 59 (J.A. 10, 22-25).

In each of their Answers, the defendants raised the affirmative defense of non-compliance with Wis. Stat. Ann. § 893.80 (West 1983 & Supp. 1986) (hereinafter cited as "§ 893.80"), the notice of claim requirement.[3] (A-4)

On March 4, 1985, this case went to trial against ten Milwaukee police officers on state and federal claims involving false arrest, the use of excessive force, false imprisonment, and conspiracy. (A-4) The case was heard before a jury and presided over by the Honorable Robert W. Landry, Circuit Court Judge for Milwaukee County. (J.A. 4)

During four days of trial, Felder and his wife testified, as did several of his neighbors who had witnessed the events in question. *See* Ex. 35 & J.A. 6. Plaintiff also

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(Continued from previous page)

interfere with his access to the state courts. See Plaintiff's Second Amended Complaint, para. 55 (J.A. 24). All the Wisconsin courts in this case have treated the § 1983 and § 1985(2) claims identically for purposes of the notice of claim issue, and in his Petition for Certiorari and this Brief Felder has only referred to his § 1983 claims.

[3]The notice of claim requirement in § 893.80 really consists of multiple requirements. First, a prospective plaintiff must serve a "written notice of the circumstances of the claim" within 120 days of the event on *both* the governmental entity and the employee. *See* § 893.80(1)(a). Second, an "itemized statement of the relief sought" must be presented to the governmental entity. *See* § 893.80(1)(b). These are separate requirements, although they may be included in a single document. *See Gutter* v. *Seamandel*, 103 Wis.2d 1, 10 n.4, 308 N.W.2d 403, 408 n.4 (1981) (construing predecessor to § 893.80). No suit may be brought until the claim is disallowed or 120 days pass, *see* § 893.80(1)(b), and any suit must be brought within six months of service of the notice of disallowance. *Id.*

called three defendants adversely and presented medical testimony. In addition, plaintiff called as a witness Milwaukee Alderman Roy Nabors, an elected member of the Milwaukee Common Council, who had responded to a call from Felder's neighbors that evening and who testified about the police investigation Alderman Nabors initiated into the incident. (J.A. 5-6)

On March 4, 1985, prior to the start of the trial, the trial court had rendered an oral decision denying the defendants' motion to dismiss the action based on Felder's non-compliance with § 893.80. On March 8, 1985, after four days of testimony, the trial court issued a written decision consistent with its oral decision.[4] Finally, at the close of plaintiff's case on March 8, 1985,[5] the trial court again denied defendants' motion to dismiss Felder's federal claims for non-compliance with § 893.80[6]

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[4]In its March 4, 1985 oral decision and March 8, 1985 written decision, the trial court assumed that § 893.80 was applicable and concluded that actual notice had been provided, *see* Tr. 2-6 (March 4, 1985); Decision (March 8, 1985), but the court ruled that under § 893.80 Felder would have to demonstrate at trial that no prejudice resulted from his failure to provide statutory notice.

[5]In summarizing the history of the case, the Wisconsin Supreme Court stated that the trial court dismissed Felder's civil rights claims after the defense rested, (A-4) but that statement is erroneous. The trial court in its Amended Order for Judgment noted that it ruled on the motions at the close of plaintiff's case. (A-25) This discrepancy, however, has no bearing on this case as the judgment of the Wisconsin Supreme Court rests squarely on its conclusion that Felder was required to comply with the notice of claim statute as a condition of bringing a § 1983 action in the Wisconsin courts.

[6]At the March 8, 1985 hearing, the trial court reiterated its earlier conclusion that actual notice was provided but found that Felder failed to make a claim for a "specific sum" and dismissed his state law claims. However, the trial court then concluded that the notice of claim requirement did not apply to § 1983 actions. Tr. 23-30 (March 8, 1985).

At the March 8, 1985, hearing, however, the trial court *sua sponte* dismissed Felder's § 1983 and related federal claims against the eight respondent police officers named in the Second Amended Complaint based on the statute of limitations. In dismissing these claims, the trial court initially ruled that the two-year limitations period for intentional torts in Wis. Stat. Ann. § 893.57 (West 1983) was applicable. Tr. 39, 43, 51 (Mar. 8, 1985). After this Court's April 17, 1985, decision in *Wilson v. Garcia,* 471 U.S. 261 (1985), however, the trial court modified its decision and ruled that the three-year limitations period for "injuries to the person" in Wis. Stat. Ann. § 893.54(1) (West 1983) applied to § 1983 actions in Wisconsin but only prospectively. Tr. 18, 20-23 (Apr. 30, 1985). Thus, it reaffirmed its earlier decision dismissing Felder's § 1983 claims based on the two-year statute of limitations. (A-27) *See also* Amended Order for Judgment. (A-26 - A-27)

With respect to the two remaining defendants, the trial court ordered the case to proceed, but Felder's counsel refused, and the trial court dismissed the § 1983 claims against the remaining defendants for failure to prosecute. (A-26)

Felder then successfully appealed to the Wisconsin Court of Appeals, which on April 24, 1986, unanimously reversed the decision of the trial court and held that the three-year limitations period for personal injury actions in Wis. Stat. Ann. § 893.54(1) (West 1983) applied retroactively to his § 1983 case. The defendants cross-appealed, arguing that Felder's § 1983 claims "are barred by his failure to comply with the notice of claims statute sec. 893.80, Stats., and by *Parratt v. Taylor,* 451 U.S. 527 (1981)." (A-23) The Court of Appeals, however, rejected the defendants' cross-appeal and summarily reversed those portions of the judgment dismissing Felder's federal civil rights claims against the eight respondents brought into the case by the Second Amended Complaint. (A-24)

The Wisconsin Supreme Court granted review in a petition filed by all ten of the respondents. The court also granted Felder's cross-petition, which was based on the uncertainty of the disposition of his § 1983 claims against the two police officers against whom his action was timely. (A-5)

On June 24, 1987, the Wisconsin Supreme Court by a four-three vote reversed the decision of the Court of Appeals and remanded the case to the trial court with instructions to dismiss the action. The court did *not* address the statute of limitations or the *Parratt* issues, but rather disposed of all Felder's § 1983 claims solely because of his failure to comply with the notice of claim requirement.

Initially, the Wisconsin Supreme Court concluded that as a matter of state law the notice of claim requirement applied to § 1983 actions filed in the Wisconsin courts.[7] (A-9) The court then rejected Felder's federal supremacy argument and held that "failure to comply with § 893.80, Stats., bars a litigant who is pressing a federal civil rights claim from proceeding with that claim in state court."[8] (A-12)

In concluding that Wisconsin courts could apply the notice of claim statute to § 1983 actions, the Wisconsin Supreme Court relied heavily on its decision in *Kramer v. Horton,* 128 Wis.2d 404, 383 N.W.2d 54, *cert. denied,*

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[7]In construing § 893.80 to apply to § 1983 actions, the Wisconsin Supreme Court relied on the broad language of the statute (A-9) and to its earlier decision applying the statute to all actions, including actions for injunctive relief. *See Figgs v. City of Milwaukee,* 121 Wis.2d 44, 52, 357 N.W.2d 548, 553 (1984).

[8]The Wisconsin Supreme Court did not expressly state whether the waiting period in § 893.80(1)(b) also applied to § 1983 actions, but given the court's discussion of the purposes of the notice of claim requirement and its unqualified application to this case, it is clear that the court also intended the waiting period to apply to § 1983 actions.

107 S.Ct. 324 (1986), in which it had held that the tenth amendment permitted states to require plaintiffs to exhaust administrative remedies as a condition of bringing § 1983 actions in state courts. (A-11 - A-12)

> While the Constitution vests in Congress "the power to prescribe the basic procedural scheme under which claims may be heard in federal courts," . . . it reserves to the state legislatures and state courts the power to prescribe the procedural scheme under which claims may be heard in state court. (A-11 - A-12) (quoting *Kramer*, 128 Wis.2d at 417, 383 N.W.2d at 59)

The court then characterized the notice of claim statute as "procedural" and stated: "that litigants who choose to press their claims in state court cannot 'elect' to ignore state procedural rules. The right to sue in state court is accompanied by the corollary duty to abide by certain rules and procedures. Section 893.80 is an example of just such a procedure." (A-12)

In reaching this conclusion, the Wisconsin Supreme Court acknowledged the existence of federal court decisions refusing to apply notice of claim statutes to § 1983 actions, but found these decisions inapplicable because the present case had been brought in *state* court. (A-11) The court then noted that § 1983 plaintiffs were free to litigate their claims in federal court. (A-12)

In addition, the Wisconsin Supreme Court addressed whether the failure of the plaintiff to give a formal statutory notice could be excused since, under § 893.80(1)(a), such failures are not fatal if the city had "actual notice" of the claim and the plaintiff could show that the failure to give notice was not prejudicial to the defendants. (A-12 - A-13)

Without reaching whether the absence of statutory notice was prejudicial, (A-14) the court held that neither the intervention of a Milwaukee alderman within hours

of the arrest, his written communication requesting an investigation, *see* Ex. 35, nor the actual investigation that was begun shortly after the incident met the "actual notice" requirement. (A-12 - A-14)[9]

Therefore, the Wisconsin Supreme Court held that the failure to comply with § 893.80 precluded Felder from proceeding further with his § 1983 action in state court. The court then reversed the decision of the Court of Appeals and remanded to the trial court with instructions to dismiss Felder's action. (A-15)

Three justices of the Wisconsin Supreme Court dissented.

Justice Shirley S. Abrahamson, joined by Chief Justice Nathan S. Heffernan, concluded that § 893.80 was inapplicable to § 1983 actions. First, they looked to the legislative history of § 893.80, which was adopted in response to the abrogation of governmental immunity from tort liability in *Holytz v. City of Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962), and concluded that the Wisconsin Legislature did not intend § 893.80 to apply to § 1983 actions. (A-17) Second, they concluded that the application of § 893.80 to § 1983 actions was inconsistent with controlling principles of federal law. (A-17)

In a separate dissent, Justice William A. Bablitch characterized the notice of claim statute as a "subtlety of state procedural law that must give way to the vindication of federal rights in state courts." (A-19) He also looked to the purpose of the notice of claim statute of avoiding prejudice to governmental units by the late

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[9] In reaching this conclusion, the court held that the 'notice" in this case did not meet the "actual notice standard" of its earlier decisions under which "documents" constituting "adequate notice" had usually, at a minimum, cited the facts giving rise to the injury and indicated an intent on the plaintiff's part to hold the city responsible. (A-14)

filing of claims and concluded that the notice given in the present case permitted a prompt investigation that "more than fulfilled" the purpose of the statute. (A-20)

SUMMARY OF ARGUMENT

State courts that entertain federally-created actions may not rely on state policies, whether characterized as procedural or substantive, that burden federal rights or are inconsistent with the federal definition of the cause of action. *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359 (1952); *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Davis v. Wechsler*, 263 U.S. 22 (1923). Moreover, this Court has rejected the use of a notice of claim requirement as a condition of litigating a federal claim in state courts. *El Paso & N.E. Ry. v. Gutierrez*, 215 U.S. 87 (1909) (FELA action).

State courts that entertain § 1983 actions are also required to apply federal policies that are part of the § 1983 cause of action. *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Martinez v. California*, 444 U.S. 277 (1980). The application of notice of claim requirements to § 1983 litigation, however, conflicts with the definition of the § 1983 cause of action.

Section 1983 entitles plaintiffs to direct access to judicial forums without regard to the availability or adequacy of state administrative remedies. *Patsy v. Board of Regents of the State of Fla.*, 457 U.S. 496 (1982).

Section 1983 plaintiffs are also entitled to rely on the general limitations period for personal injury actions, *see Wilson v. Garcia*, 471 U.S. 261 (1985), but the use of a 120-day notice of claim requirement conflicts with this policy, ignores the practicalities of litigation, and denies plaintiffs a "reasonable time to sue." *Burnett v. Grattan*, 468 U.S. 42, 50-51 & 53 n.15 (1984).

Notice of claim requirements are part of state immunity statutes that limit governmental liability, but the immunities applicable in § 1983 cases are derived from federal law. Notice of claim requirements were unknown at common law and, when they exist, are solely statutory requirements. Had the 42d Congress intended to permit the use of notice of claim requirements in § 1983 litigation, they would have provided so explicitly.

Although courts entertaining § 1983 actions may look to state law to fill gaps in federal law, under 42 U.S.C. § 1988, they may borrow state policies only when federal law is deficient. *Burnett v. Grattan, supra.* The mere absence of a federal policy requiring the use of notice of claim requirements is not a deficiency in federal law. *Robertson v. Wegmann*, 436 U.S. 584 (1978); *Brown v. United States*, 742 F.2d 1498 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1073 (1985).

State courts entertaining § 1983 actions may sometimes apply state counterparts to policies that apply only in federal courts, but state courts may not burden § 1983 litigation or apply policies that are inconsistent with either the definition or the purposes of § 1983. Moreover, even when federal law is deficient, courts only borrow state policies that are appropriate in light of the purposes of § 1983. *Burnett v. Gratton, supra.* Notice of claim requirements, however, give governmental defendants special protection in traditional municipal tort litigation and have little relevance to § 1983 actions to enforce federal rights.

Even if notice of claim requirements were applicable to state court § 1983 litigation, their use to dismiss this case (in which an investigation was conducted within days of the incident) is a subtlety of state procedural law and an inadequate state ground that must give way to the vindication of plaintiff's federal rights.

The use of notice of claim requirements in state but not federal court § 1983 litigation will discourage plaintiffs from filing § 1983 actions in state courts. Most § 1983 litigation takes place in federal courts, but plaintiffs must be free to file federal claims in state courts if state courts are to play their proper role in our system of judicial federalism. *Maine v. Thiboutot*, 448 U.S. 1 (1980).

The tenth amendment does not guarantee state courts entertaining § 1983 actions the right to require compliance with notice of claim requirements. Such requirements are not indisputable attributes of state sovereignty. Nor would their rejection directly impair the state's ability to structure integral operations in areas of traditional governmental functions. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Moreover, any impact on state courts from the rejection of notice of claim requirements in § 1983 litigation is likely to be minimal and indirect.

Section 1983 was enacted, in part, because of the inadequacy of state remedies, and it would be anomalous to apply state policies that limit the liability of municipal defendants to § 1983 litigation.

ARGUMENT

I. STATE COURTS THAT ENTERTAIN § 1983 ACTIONS ARE REQUIRED TO APPLY THE ENTIRE FEDERAL CAUSE OF ACTION.

State courts have concurrent jurisdiction over § 1983 actions, *see Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980); *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980), but this Court has expressly reserved whether state courts are obliga ! to entertain § 1983 actions.[10] Nonetheless, state

[10]In reserving this question, the *Martinez* Court relied on the nondiscrimination principle of *Testa v. Katt*, 330 U.S. 386

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courts that entertain federally-created actions, including § 1983 actions,[11] are required to apply the entire federal

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(1947), to point out that state courts that entertained "the same type of claim, if arising under state law . . . are generally not free to refuse enforcement of the federal claim." 444 U.S. at 283 n.7. *See also McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934) (prohibiting Alabama courts from discriminating against federally authorized FELA actions). *Cf. Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982) (upholding federal statute requiring state public utility rate-making bodies to consider certain energy-saving measures).

State courts, however, are required to do more than refrain from discriminating against federal causes of action. In *Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1 (1912), the Connecticut courts of general jurisdiction refused to entertain FELA actions because of their disagreement with the policies underlying that federal statute. Classifying that disagreement as "inadmissible," *id.* at 57, and relying on the presumption of concurrent jurisdiction, *see Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876), this Court stated that "[t]he existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication." *Mondou*, 223 U.S. at 58. *Mondou* established an affirmative duty of state courts to hear federal cases within their jurisdiction, and state courts should no more be permitted to refuse to exercise jurisdiction over § 1983 actions than the courts of Connecticut were able to refuse to entertain FELA cases.

It is not necessary, however, to resolve the issue of the duty of state courts to entertain § 1983 actions in the present case, because Wisconsin, like Maine and California, *see Thiboutot*, 448 U.S. at 3 n.1; *Martinez*, 444 U.S. at 283 n.7, has voluntarily opened its courts to § 1983 actions. *See Terry v. Kolski*, 78 Wis. 2d 475, 254 N.W.2d 704 (1977).

[11]At present, no state categorically refuses to entertain § 1983 actions in their courts, and there are appellate court decisions in virtually all states expressly or implicitly opening the courts of that state to § 1983 litigation. *See* S. Steinglass, *Section 1983 Litigation in State Courts*, app. E (1988). The Tennessee Supreme Court had previously held that jurisdiction over § 1983 actions was exclusively federal, *see Chamberlain v. Brown*, 223 Tenn.

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cause of action with all its remedial attributes. The decision of the Wisconsin Supreme Court applying the state notice of claim requirement to § 1983 actions conflicts with this principle.

A. State Courts Entertaining Federally-Created Actions Must Hear the Entire Federal Cause of Action.

In the present case, the Wisconsin Supreme Court held that § 1983 "litigants who choose to press their claims in state court cannot 'elect' to ignore [state] procedural rules." (A-12) This characterization of the notice of claim requirement as procedural, however, does not support the use of a state policy that has a substantial impact on the litigation of federal claims in state courts. State characterizations of policies as "procedural" or "substantive" do not control choice of law decisions, *cf. Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945), and state courts that entertain federal causes of action may not impose state policies that burden the litigation of federal claims or conflict with the federal definition of the cause of action.

In *Davis v. Wechsler*, 263 U.S. 22 (1923), a personal injury suit against a railroad under federal control during World War I, the state courts applied a state practice to conclude that the railroad had waived its federal venue defense. In rejecting this position, Justice Holmes, writing for a unanimous Court, ruled that the state practice could not defeat the assertion of the federal right, noting that "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Id.* at 24.

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25, 442 S.W.2d 248 (1969), but in *Poling v. Goins*, 713 S.W.2d 305 (Tenn. 1985), the court overruled *Chamberlain* and held that the Tennessee state courts could exercise concurrent jurisdiction over § 1983 actions.

In *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), a state court action under the Jones Act, this Court rejected a state policy that placed the burden of proof on the validity of releases on plaintiffs despite the federal practice of placing the burden on ship owners. The Pennsylvania Supreme Court, like the Wisconsin Supreme Court in the present case, had characterized the state rule as merely procedural and applied it in the federally-created action. Without deciding whether states were required to make their courts available for enforcing federal claims, this Court prohibited the Pennsylvania courts from altering rights established under federal law.

> The source of the governing law applied is in the national, not the state, government. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the State would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. . . . [I]n trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected.

Id. at 245 (footnotes omitted). The fact that Pennsylvania had voluntarily "opened its courts to petitioner to enforce federally created rights" was enough to require the state to give plaintiffs "the benefit of the full scope of these [federal] rights," *id.* at 249, and the state courts did not have authority to reject a policy that "inhered in . . . [the federal] cause of action." *Id.*[12]

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[12]In requiring state courts to give full effect to federal rights, the *Garrett* Court relied on *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and the goal of "assur[ing] litigants full protection

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In *Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949), this Court rejected a strict state pleading rule that resulted in the dismissal of a FELA action. This Court granted certiorari "because the implications of the dismissal were considered important to a correct and uniform application of the federal act in the state and federal courts." *Id.* at 295. Noting that "[t]his federal right cannot be defeated by the forms of local practice," this Court reversed the dismissal. *Id.* at 296.

Finally, in *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952), this Court addressed the question whether the judge or jury in FELA cases decided factual issues of fraud in the execution of a release. As a matter of local practice in personal injury cases, the Ohio courts refused to extend the right to trial by jury because of the equitable nature of the defense. Despite the inapplicability of the seventh amendment to the states, this Court rejected the Ohio practice of singling out one phase of the trial for determination by the judge. In so ruling, this Court characterized the right to jury trial as "too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule or procedure.'" *Id.* at 363.[13]

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for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates." *Garrett*, 317 U.S. at 245. *Cf. Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939) (federal courts must follow state burden of proof in diversity cases).

[13]In *Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211 (1916), this Court permitted state courts that entertained FELA actions to use non-unanimous jury verdicts, but that decision is based on a finding that Congress did not intend to impose all aspects of the seventh amendment on the state courts. It also anticipated subsequent decisions giving states greater latitude in implementing federal jury guarantees. *Cf. Apodaca v. Oregon*, 406 U.S. 404 (1972) (upholding nonunanimous jury verdicts in state criminal cases); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (same).

This Court has also rejected the application of notice of claim requirements to federally-created actions. In *El Paso & Northeastern Railway v. Gutierrez*, 215 U.S. 87 (1909), a widow filed a FELA action against a railroad in the Texas state courts for damages arising out of the death of her husband. The railroad set up as a full defense[14] the plaintiff's failure to comply with a territorial notice of claim statute.[15] Concluding that "an act of Congress . . . would necessarily supersede the territorial law regulating the same subject," *id.* at 93, this Court held that the failure to comply with the notice of claim requirement did not bar the plaintiff from litigating her federal claim in a state court.

The decision of the Wisconsin Supreme Court requiring the plaintiff to comply with the state notice of claim requirement conflicts with this Court's approach to notice of claim statutes in *Gutierrez* and with the requirement that state courts entertaining federal causes of action accept the entire cause of action with all its remedial attributes. The mere characterization of a state practice as procedural is not sufficient to require compliance with that practice when federal claims are litigated in state courts.[16]

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[14]The railroad also claimed that the federal act could not be applied to the territories because of this Court's decision in the *Employers' Liability Cases*, 207 U.S. 463 (1908) (holding the original FELA statute unconstitutional), but this Court held the federal act to be severable. *Gutierrez*, 215 U.S. at 96-97.

[15]This Court had previously upheld the application of the same territorial statute in the Texas state courts, *see Atchison, T. & S.F. Ry. v. Sowers*, 213 U.S. 55 (1909), and therefore the railroad would have had a good defense but for the federal nature of the plaintiff's claim. *See Gutierrez*, 215 U.S. at 92-93.

[16]Federal courts that have addressed notice of claim issues in the course of entertaining state law claims under diversity and pendent jurisdiction have refused to classify notice of claim requirements as procedural and have applied such state policies to state law claims. *See, e.g., Orthmann v. Apple River Camp-*

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B. State Courts Entertaining § 1983 Actions Must Apply the Entire Federal Cause of Action.

This Court has not addressed the application of notice of claim requirements to state court § 1983 litigation, but it has required state courts that entertain § 1983 acions to first define the scope of the federal cause of action and then to apply § 1983 with all its remedial attributes. In taking this approach to state court § 1983 cases, this Court has applied the same principles developed in FELA litigation in which it required state courts to apply the policies that are part of the federally-defined cause of action.

In *Martinez v. California*, 444 U.S. 277 (1980), this Court refused to allow state parole officials to interpose a state-created immunity defense to a § 1983 claim, even though the action had been brought in a state court. At the time of *Martinez*, the immunity to which state parole officials were entitled under federal law was unsettled, but California provided them with absolute immunity. Without reaching whether California courts were required to entertain § 1983 claims, this Court noted that the California courts had accepted jurisdiction over § 1983 actions. *Id.* at 283 n.7. The Court then rejected the application of the state-created immunity to plaintiff's § 1983 claim. In taking this position, this Court made clear that federal law controls.

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ground, Inc., 757 F.2d 909, 911 (7th Cir. 1985) (diversity jurisdiction); *Piesco v. City of New York Dep't of Personnel*, 650 F.Supp. 896, 900-01 (S.D. N.Y. 1987) (pendent jurisdiction). This borrowing of state policies to govern state-created actions is consistent with the *Erie* doctrine under which federal courts look at the impact of state policies on the twin aims of *Erie* of avoiding forum shopping and assuring the equitable administration of the law. *See Hanna v. Plummer*, 380 U.S. 460, 468 (1965). The decision of the Wisconsin Supreme Court in this case, if not reversed, will produce different results in § 1983 cases in state and federal courts and will lead to the very evils this Court attempted to curb in *Erie* and its progeny.

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced . . . . The immunity claim raises a question of federal law.

Id. at 284 n.8 (quoting *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974)).

In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court again made clear that the policies developed in federal court § 1983 litigation also applied to state court § 1983 actions. In *Thiboutot*, this Court held that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, applied in state court § 1983 litigation, despite the fact that the Act did not expressly authorize state courts to award fees. The Act was adopted in response to the decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), rejecting the inherent power of federal courts to award fees on a private attorney general basis, but it refers to "court" generically. In applying the Act to state courts, this Court relied on its legislative history, including the characterization of the fee provision as an "integral" part of the § 1983 remedy. 448 U.S. at 11.

Martinez, *Thiboutot*, and the FELA and other cases discussed earlier, *see supra* I.A., require state courts that entertain § 1983 actions to apply the full cause of action with all its remedial attributes. This requires state courts to address the scope of the § 1983 cause of action. The Wisconsin Supreme Court, however, ignored this threshold issue when it concluded that state courts could apply state notice of claim requirements. By failing to first define the scope of the remedy established by § 1983, the Wisconsin Supreme Court departed from the approach this Court has

followed in construing federally-created actions, including actions authorized by § 1983.[17]

II. THE APPLICATION OF STATE NOTICE OF CLAIM REQUIREMENTS TO § 1983 LITIGATION IS INCONSISTENT WITH PRINCIPLES DEVELOPED BY THIS COURT IN CONSTRUING § 1983.

By applying a special set of state statutory policies developed for litigation with municipal defendants, the Wisconsin Supreme Court has burdened the § 1983 cause of action and acted inconsistently with principles developed by this Court in construing § 1983. Wisconsin may use notice of claim requirements to limit liability in cases arising under state law. It may not, however, apply those policies to § 1983 actions.

A. The Use of State Notice of Claim Requirements In § 1983 Actions Is Inconsistent With This Court's Decisions in Patsy, Wilson and Martinez.

1. The notice of claim requirement is an impermissible exhaustion requirement.

The application of state notice of claim requirements to § 1983 litigation is inconsistent with this Court's interpretation of § 1983 as guaranteeing plaintiffs direct

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[17]Most state courts that have addressed the issue take the position that federal law bars the application of notice of claim requirements to state court § 1983 litigation. *See Williams v. Horvath*, 16Cal.3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976); *Mucci v. Falcon School Dist.*, 655 P.2d 422 (Colo. Ct. App. 1982); *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888 (1982); *Fuchilla v. Layman*, 210 N.J. Super. 574, 510 A.2d 281 (App. Div.), *cert. granted*, 105 N.J. 563, 523 A.2d 196 (1986); *Willborn v. City of Tulsa*, 721 P.2d 803 (Okla. 1986); *Spencer v. City of Seagoville*, 700 S.W.2d 953 (Tex. Ct. App. 1985). *But see Clark v. Indiana Dep't of Pub. Welfare*, 478 N.E.2d 699 (Ind. Ct. App. 1985), *cert. denied*, 106 S.Ct. 2893 (1986); *423 South Salina St. v. City of Syracuse*, 68 N.Y.2d 474, 503 N.E.2d 63, 410 N.Y.S.2d 507 (1986), *appeal dismissed*, 107 S.Ct. 1880 (1987).

access to judicial forums regardless of the availability or adequacy of state administrative remedies.

In *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 516 (1982), this Court held that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Patsy* involved a case that began in federal court, but the issue involved the scope of § 1983, which provides a federal remedy for the enforcement of federal rights because of the inadequacy of state remedies. *See Monroe v. Pape*, 365 U.S. 167, 173-74 (1961).

In adopting a no-exhaustion policy for § 1983 litigation, the *Patsy* Court did not limit its holding to federal courts. Rather, it noted broadly that "the 1871 Congress did not intend that an individual be compelled in every case to exhaust state administrative remedies before filing an action under [§ 1983]." 457 U.S. at 507.

The Wisconsin notice of claim statute does not provide claimants with adjudicatory hearings, but prospective § 1983 plaintiffs must exhaust state claim procedures and thus are denied the immediate access to judicial forums to which they are entitled.[18]

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[18]In *Ehlers v. City of Decatur*, 614 F.2d 54, 56 (5th Cir. 1980), Judge Godbold rejected the application of the Georgia ante-litem notice provision to § 1983 because of its resemblance to an exhaustion requirement.

> The statute at issue here consists of both a time limitation and a requirement of exhaustion of administrative remedies. . . . A litigant, however promptly he acts, is prevented from bringing suit unless he has notified the municipality of his intention to do so. Moreover, once he provides the requisite notice, he must still postpone his suit until either the municipality acts on his claim or 30 days elapses. . . . This is not a jurisdictional prerequisite but an explicit requirement of exhaustion of remedies.

Accord Majette v. O'Connor, 811 F.2d 1416, 1418 (11th Cir. 1987); *Mathias v. City of Milwaukee Dep't of City Dev.*, 377 F. Supp. 497, 500 (E.D. Wis. 1974).

Requiring state courts that entertain § 1983 actions to apply the full federal cause of action is consistent with the remedial purpose of § 1983. Section 1983 creates a cause of action: a remedy for violations of federal law. It neither confers jurisdiction on federal courts nor creates substantive rights, *see Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979), although the creation of a federal forum was clearly one of the goals of the 42d Congress.

In *Patsy*, this Court stated "that many legislators interpreted the bill to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief." 457 U.S. at 506. Given this goal, "[i]t would be anomalous . . . to apply a state policy restricting remedies against public officials to a federal statute that is designed to augment remedies against those officials, especially a federal statute that affords remedies for the protection of constitutional rights." *Burnett v. Grattan*, 468 U.S. 42, 55 n.18 (1984) (quoting *Pauk v. Board of Trustees of City Univ. of N.Y.*, 654 F.2d 856, 862 (1981), *cert. denied*, 455 U.S. 1000 (1982)).

State courts that entertain § 1983 actions, however, are often reluctant to abandon familiar state policies. For example, in the present case, the Wisconsin Supreme court relied on its decision in *Kramer v. Horton*, 128 Wis.2d 404, 383 N.W.2d 54, *cert. denied*, 107 S.Ct. 324 (1986), in which it construed *Patsy* as applying only in federal courts. Such a narrow reading of *Patsy*, however, reflects a basic, but not isolated, misunderstanding of this Court's role in defining federal causes of action that may be litigated in *both* state and federal courts,[19] and has been described

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[19]In *Smith v. Wade*, 461 U.S. 30, 55 n.23 (1983), the Court pointed out that the uniform federal damage principles developed in § 1983 litigation applied in state as well as federal

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by Justice White as "questionable." *Caylor v. City of Red Bluff*, 474 U.S. 1037 (1985) (White, J., dissenting), *denying cert. to* No. 3 Civ. 2[illegible]3 (Cal. Ct. App. March 26, 1985).

2. The use of notice of claim requirements in § 1983 litigation is inconsistent with this Court's statute of limitations decisions.

The application of the Wisconsin 120-day notice of claim requirement in § 1983 litigation is also inconsistent with this Court's approach to the selection of the appropriate statute of limitations. In *Wilson v. Garcia*, 471 U.S. 261 (1985), this Court required courts entertaining § 1983 actions to borrow the general limitations period for personal injury actions and expressly rejected the use of a limitations period for wrongs committed by public officials. *Id.* at 279.

The Wisconsin notice of claim statute does not require the commencement of litigation within 120 days of the event. Nonetheless, it requires prospective § 1983 plaintiffs to take significant steps within the 120-day period, including the filing of a statutory notice that not only recites the facts giving rise to the injuries but also indicates an intent to hold the city responsible for the resulting damages. (A-14)

The use of the 120-day notice of claim period also ignores the "practicalities of litigation," which this Court described in *Burnett v. Grattan*, 468 U.S. 42, 50 (1984).

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courts, a point some state courts have been unwilling to accept. *See Nelson v. Lane County*, 79 Or. App. 753, 720 P.2d 1291 (1986) (punitive damages unavailable in § 1983 suits against governmental employees), *aff'd in part, rev'd in part on other grounds*, 304 Or. 97, 743 P.2d 692 (1987); *Williams v. McNeil*, 432 So.2d 950 (La. Ct. App.) (punitive damages unavailable in § 1983 litigation), *writ denied*, 437 So.2d 1151 (1983).

> Litigating a civil rights claim requires considerable preparation. An injured person must recognize the constitutional dimensions of his injury. He must obtain counsel, or prepare to proceed *pro se*. He must conduct enough investigation to draft pleadings that meet the requirements of federal rules; he must also establish the amount of his damages, prepare legal documents, pay a substantial filing fee or prepare additional papers to support a request of proceed in forma pauperis, and file and service his complaint. At the same time, the litigant must look ahead to the responsibilities that immediately follow filing of a complaint. He must be prepared to withstand various responses, such as a motion to dismiss, as well as to undertake additional discovery.

Many of these factors are applicable to claimants contemplating § 1983 actions. Injured parties must recognize the constitutional and other dimensions of their injury. They must also obtain counsel quickly or prepare to proceed *pro se*. Claimants need not draft "pleadings," but they must meet the often technical requirements that characterize notice of claim statutes. They or their attorneys must also conduct enough of an investigation to conclude that they have a bona fide claim. Claimants in Wisconsin must also determine the precise amount of their damages, because the Wisconsin courts interpret § 893.80(1)(b) as requiring a "specific sum" to be included in the "itemized statement of the relief sought." *See Gutter v. Seamandel*, 103 Wis.2d 1, 308 N.W.2d 403, 409 (1981) (claim for "in excess of $25,000" does not meet statute); *Patterman v. City of Whitewater*, 32 Wis.2d 350, 358-59, 145 N.W.2d 705, 709 (1966) (claim stating that "damages would not exceed $25,000 statutory limitations" does not meet statute).

The requirement that § 1983 plaintiffs take these steps substantially in advance of filing their complaint deviates from the policies adopted in *Wilson*. In the present case, the Wisconsin Court of Appeals concluded that a three-

year limitations period applied, (A-22 - A-23) but the Wisconsin Supreme Court dismissed the action because Felder did not file a statutory notice within 120 days of the event giving rise to his action. This application of the notice of claim requirement to § 1983 litigation effectively imposes a 120-day limitations period borrowed from the state statute governing wrongs committed by public officials. This Court in *Wilson*, however, explicitly rejected the analogous limitations period from the New Mexico Tort Claims Act. 471 U.S. at 279.

State statutes of limitations applicable to federal rights "must give a party a reasonable time to sue." *Campbell v. Haverhill*, 155 U.S. 610, 615 (1895), *cited with approval in Burnett v. Grattan*, 468 U.S. 42, 53 n.15 (1984). The use of a 120-day notice of claim requirement in § 1983 litigation fails to give plaintiffs adequate time to prepare civil rights litigation. It is also inconsistent with this Court's goal in *Wilson* of selecting the neutral general limitations period for personal injury actions to assure that states do not intentionally or otherwise discriminate against § 1983 claims. 471 U.S. at 279.

3. The application of notice of claim requirements to § 1983 litigation is inconsistent with this Court's immunity decisions.

Notice of claim requirements are part of state immunity statutes that limit the liability of local governmental entities and their employees. The application of such state policies to § 1983 litigation, however, is inconsistent with this Court's approach to § 1983 immunity issues, which this Court has consistently treated as matters of federal law. *See, e.g., Owen v. City of Independence*, 445 U.S. 622 (1980); *Martinez v. California*, 444 U.S. 277 (1980); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

In addressing the immunities available in § 1983 litigation, this Court has looked to the status of the claimed immunity at common law in 1871. When the immunity

was well established, this Court has been unwilling to assume that Congress would have rejected the immunity absent some clear evidence of congressional intent. *See Briscoe v. LaHue*, 460 U.S. 325, 330-34 (1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258-59 (1981); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). On the other hand, when an immunity did not exist at common law or was not well established, this Court has construed § 1983 literally and denied the immunity despite the absence of guidance in the legislative history. *See Tower v. Glover*, 467 U.S. 914 (1984); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

In 1871, when the predecessor of § 1983 was enacted, "municipalities—like private corporations—were treated as natural persons for virtually all purposes of constitutional and statutory analysis. In particular, they were routinely sued in both federal and state courts." *Owen v. City of Independence*, 445 U.S. 622, 639 (1980). *See also Monell v. Department of Social Serv.*, 436 U.S. 658, 687-88 (1978).[20]

Notice of claim requirements were unknown at common law, and, when they exist, are solely statutory requirements. *See* C. Antieau, *Municipal Corporation Law* § 11.211 (1987); E. Yokley, *Municipal Corporations* § 518 (1958); E. McQuillin, *Municipal Corporations* § 48.03, at 54 (3d ed. 1982); C. Elliott, *Municipal Corporations* § 204 (2d ed. 1910); J. Dillon, *Municipal Corporations* § 937, at 1142 n.5 (4th ed. 1890). *See also Green v. Spencer*, 67 Iowa 410, 25 N.W. 681 (1885).

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[20]The present case involves a suit against municipal employees not the municipality, but the Wisconsin notice of claim requirement applies to suits against both municipalities and their employees. Thus, under § 893.80(1)(a) & (b), a plaintiff must file a notice of claim with the municipality to sue a municipal employee.

The 42d Congress vigorously debated proposals involving the liability of municipalities, *see Monell*, 436 U.S. at 664-83, but § 1 of the Civil Rights Act of 1871 does not contain a notice of claim requirement. Nor was a notice of claim requirement included in the First Conference Report on the Sherman Amendment. *See Monell*, 436 U.S. at 703-04. This proposed amendment sought to make the "county, city, or parish" liable for illegal activities within its borders and is the only statutory provision in the proposed legislation in which municipal liability is addressed expressly. The proponents of this amendment went to great lengths to emphasize the procedural safeguards that would limit governmental liability, and Senator Edmunds noted that "[i]f the municipality or its inhabitants are to be made responsible at all, we have adopted the tenderest and most convenient way." Cong. Globe, 42d Cong., 1st Sess. 756 (1871). These "safeguards" primarily involved detailed provisions on the joinder of co-defendants suspected of the outrages and on the execution and subrogation of judgments. *Id* at 751 (Rep. Shellabarger); *id.* at 756 (Sen. Edmunds). The concerns of the opponents, however, were not allayed, and Senator Thurman criticized the proposal as going further than the law of England in dispensing with conditions precedent to sue, including notice of claim requirements. *Id.* at 770 (discussing the English seven-day claim requirement).

The First Conference Report was ultimately rejected for reasons involving the constitutionality and wisdom of imposing this far-reaching liability on local government, *see Monell*, 436 U.S. at 668-69, but the broad remedial civil action in § 1, *see Monell*, 436 U.S. at 684 (quoting Rep. Shellabarger), subjected "persons," including municipalities, to suit without a notice of claim requirement. Thus, given the purpose of Congress in creating a federal remedy to supplement inadequate state remedies, *see Monroe*, 365 U.S. at 173-74, the absence of notice of claim requirements at common law, and their status as purely

statutory conditions to sue, Congress would have been explicit had it contemplated that § 1983 actions would only be available to plaintiffs who complied with notice of claim requirements.

In *Williams v. Horvath*, 16 Cal.3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976), the California Supreme Court addressed the application of a notice of claim requirement to § 1983 litigation. Justice Mosk, writing for a unanimous court, noted the close relationship between the 100-day California notice of claim requirement and the legislative restoration of governmental immunity after its judicial abrogation and rejected the application of the state notice of claim requirement to § 1983 actions.

The Wisconsin notice of claim requirement is part and parcel of the state immunity statute. Like the California Tort Claims Act, § 893.80 was adopted as part of a statute that restored partial governmental immunity following its abrogation. *See* A-17 (Abrahamson, J., dissenting). *See also* Legislative Council Report on § 893.80 (1976) *reprinted in* Wis. Stat. Ann. § 893.80 (West 1983). By applying this requirement to § 1983 litigation, the Wisconsin Supreme Court departed from principles established by this Court and effectively immunized the defendants from potential liability under § 1983.[21]

B. There Is No Deficiency in Federal Law That Requires Courts Entertaining § 1983 Actions To Borrow State Notice of Claim Requirements.

Under 42 U.S.C. § 1988, courts exercising jurisdiction over § 1983 actions are required to exercise their juris-

[21]Federal courts that have traced notice of claim requirements to state immunity doctrines have also rejected their applicability to § 1983 litigation. *See, e.g., Brown v. United States*, 742 F.2d 1498, 1508-09 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1073 (1985); *Donovan v. Reinbold*, 433 F.2d 738, 741 (9th Cir. 1970); *Willis v. Reddin*, 418 F.2d 702, 704-05 (9th Cir. 1969).

diction in conformity with suitable provisions of federal law. Federal law, however, sometimes fails to address matters that are essential to the conduct of litigation, and § 1988 governs how courts entertaining § 1983 actions fill gaps in federal law.[22]

In *Burnett v. Grattan*, 468 U.S. 42, 47-48 n.10 (1984), this Court adopted a three-step borrowing process under § 1988 to guide courts trying to fill gaps in federal law in § 1983 and other civil rights litigation. Initially, the deficiency clause of § 1988 requires courts hearing § 1983 actions to follow "the laws of the United States" except "where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law." Second, when there is a deficiency, § 1988 instructs courts to adopt the analogous state law policy. Finally, the inconsistency clause of § 1988 requires the rejection of borrowed state policies that are inconsistent with the purposes of § 1983.

The borrowing in which federal courts engage in § 1983 litigation is not open-ended and, in *West v. Conrail*, 107 S.Ct. 1538, 1542 n.6 (1987), this Court, discussing the use of state policies in § 1983 cases, observed that [t]he governing principle is that we borrow only what is necessary to fill the gap left by Congress." *Id.* at 1542 n.6.

The United States Court of Appeals for the District of Columbia applied this principle in *Brown v. United*

[22]This Court has held the federal choice of law statute, 42 U.S.C. § 1988 (1982), to be applicable to civil rights litigation in state courts. *See Sullivan v. Little Hunting Park*, 396 U.S. 229, 239-40 (1969) (§ 1982 action). *See also Maine v. Thiboutot*, 448 U.S. 1 (1980) (attorney fee provision of § 1988). *Cf. Wilson v. Garcia*, 471 U.S. 261, 265-66 (1985) (assuming that the appropriate limitations period for § 1983 would also apply in state courts). However, even if the first sentence in § 1988, which deals with choice of law, did not apply in state courts, this Court should still apply the same policies in state court § 1983 litigation as it applies in federal court § 1983 litigation as a matter of federal common law.

States, 742 F.2d 1498 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1073 (1985), when it rejected the application of a notice of claim requirement to § 1983 litigation. The *Brown* court noted that the issue was "neither how to incorporate into federal law as much state law as a federal action will tolerate, nor how best to further state policies and goals in the litigation of a federal action." *Id.* at 1504. Rather,

> the issue is how to best effectuate the federal policies embodied in a federal action when the action does not itself supply the complete legal framework necessary to the effectuation of those policies. Because the practice of borrowing presupposes a need to fill a deficiency in the federal scheme, a court must first look to see if there is indeed such a deficiency. *Id.*

This Court, however, has only found deficiencies in federal law in the area of statutes of limitations (and related policies on tolling and revival) and survival policies. *See Wilson v. Garcia*, 471 U.S. 261 (1985); *Burnett v. Grattan*, 468 U.S. 42 (1984); *Chardon v. Fumero Soto*, 462 U.S. 650 (1983) (revival); *Board of Regents v. Tomanio*, 446 U.S. 478 (1980) (tolling); *Robertson v. Wegmann*, 436 U.S. 584 (1978) (survival). On the other hand, the damages available in § 1983 actions, *see Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986); *Smith v. Wade*, 461 U.S. 30 (1983); *Carey v. Piphus*, 435 U.S. 247 (1978), the applicable immunities, *see Owen v. City of Independence*, 445 U.S. 622 (1980); *Scheuer v. Rhodes*, 416 U.S. 232 (1974), and the absence of an exhaustion of administrative remedies requirement, *see Patsy v. Board of Regents of the State of Fla.*, 457 U.S. 496 (1982), are governed by uniform national policies that apply without regard to the law of the forum state.

A deficiency within the meaning of § 1988 only exists when federal law, including § 1983 and other applicable provisions of federal constitutional, statutory, or common law, does not address matters that are essential to the

conduct of litigation.[23] The mere existence of a state policy for which there is no federal counterpart does not support a finding that federal law is deficient.

In *Moor v. County of Alameda*, 411 U.S. 693, 702 (1973), this Court stated that "existing federal law will not cover every issue that may arise in the context of a federal civil rights action." In making this observation, the Court was stating an obvious fact of federal court litigation and was not construing the deficiency clause. *Moor* then assumed that there was a deficiency and held that § 1988 did not "authorize the wholesale importation into federal law of state causes of action." *Id.* at 703. Thus,

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[23]Federal law may also not be deficient because notice of claim requirements did not exist at common law. *See supra* II.A.3. Thus, the federal common law may require the rejection of notice of claim requirements in the absence of federal statutory notice of claim requirements. *Cf.* 28 U.S.C. § 2675(a) (statutory requirement of filing an administrative claim under the Federal Tort Claims Act); D.C. Code Ann. § 12-309 (1981) (congressionally approved notice of claim requirement for actions for unliquidated damages against the District of Columbia). Such a construction of § 1988 would require this Court to conclude that the phrase "laws of the United States" in the introductory language of § 1988 includes the federal common law. The argument has been made that Congress was only referring to "federal statutory law" when it used the unmodified phrase "laws of the United States" as contrasted to the "common law" that courts rely on when there is a deficiency. Eisenberg, *State Law and Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. Pa. L. Rev. 499, 515 (1980). However, given the lack of clarity in the language of § 1988, *id.* at 501, and the logic of using the narrower phrase to describe the law that was subject to being "modified and changed" by state positive law, Congress may well have expected courts to look to the federal common law before borrowing state law. Moreover, federal courts had broad authority over the common law in this pre-*Erie* era. *See generally Theis, Shaw v. Garrison: Some Observations on 42 U.S.C. § 1988 and Federal Common Law*, 36 La. L. Rev. 681 (1976). *See also* Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. Pa. L. Rev. 601 (1985) (urging courts to develop a federal common law of civil rights actions).

the Court rejected the use of § 1988 to borrow a state cause of action based on vicarious liability. *Accord Runyon v. McCrary*, 427 U.S. 160, 184-86 (1976) (construing the first sentence of § 1988 as not authorizing awards of attorney fees without addressing the deficiency clause).

In *Robertson v. Wegmann*, 436 U.S. 584 (1978), on the other hand, this Court relied on § 1988 to borrow a state policy on survival but again did not define the deficiency clause. After citing the statement in *Moor* that federal law does not cover every issue that may arise in civil rights actions, *id.* at 588, the *Robertson* Court treated state law as being deficient. The parties in *Robertson*, however, had assumed that § 1988 governed the choice of law issue and that federal law was deficient,[24] *see* 436 U.S. at 588, and this Court did not independently construe the deficiency clause. Thus, this Court has not adopted a test under which federal law is deficient simply because it does not cover a particular issue.

Federal courts that have addressed the question of the deficiency of federal law with respect to notice of claim requirements have found federal law not to be deficient and thus have not had any need to look to state law.[25] For example, in refusing to apply a notice of claim requirement to § 1983 litigation, the District of Columbia Circuit

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[24]The respondent in *Robertson* conceded that "the Civil Rights Act is silent as to the survival of actions under Section 1983" and that there was a "gap" or "deficiency," but argued that the borrowed Louisiana policy should be rejected because it was inhospitable to the § 1983 claim. Brief of Respondent at 6, *Roberston v. Wegmann*, 436 U.S. 584 (1978).

[25]*See, e.g., Brown v. United States*, 742 F.2d 1498, 1504-07 (D.C. Cir. 1984) (en banc), *cert denied*, 471 U.S. 1073 (1985); *Burroughs v. Holiday Inn*, 621 F.Supp. 351, 354 (W.D. N.Y. 1985); *Williams v. Allen*, 616 F.Supp. 653 (E.D. N.Y. 1985). *But cf. Cardo v. Lakeland Cent. School Dist.*, 592 F.Supp. 765, 772-73 (S.D. N.Y. 1984) (applying notice of claim requirement to § 1983 without making deficiency inquiry).

rejected a reading of § 1988 under which federal law would be considered "deficient" whenever federal law did not cover the issue. *Brown*, 742 F.2d at 1507 n.5. After reviewing this Court's § 1988 decisions, the *Brown* court concluded that a deficiency existed "only where the particular type of provision in question is deemed necessary and reasonable." *Id.*

Unlike statutes of limitations, which are "universally familiar procedural aspects of litigation, and . . . essential to a fair scheme of litigation," *id.* at 1506, notice of claim requirements are only applicable to litigation against governmental defendants and are in no way essential to govern litigation. Moreover, notice of claim requirements supplement the neutral statutes of limitations that are available to protect all litigants, and the absence of notice of claim requirements from federal law is not a deficiency within the meaning of § 1988.

When state courts entertain § 1983 actions, they must also determine whether the federal cause of action addresses the issue at hand. State courts, however, may look to state law at some point, because some provisions of federal law are uniquely applicable to federal court litigation.[26] For example, state courts entertaining § 1983 actions may follow the state rules of evidence and civil procedure as well as state policies on jury unanimity, forum non conveniens and venue as long as those state policies do not burden § 1983 litigation or conflict with its pur-

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[26]In some cases, state courts may also be required to determine what the federal common law policy would be in the absence of a policy uniquely applicable to federal courts. For example, if the Federal Rules of Civil Procedure were amended to require cautionary jury instructions on the non-taxability of damage awards, state courts entertaining FELA actions might still be required to apply the federal common law policy identified in *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490 (1980), and give such instructions.

poses. *Cf. Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950) (forum non conveniens); *Herb v. Pitcairn*, 324 U.S. 117 (1945) (which state courts will entertain FELA actions); *Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211 (1916) (jury unanimity). On the other hand, state courts entertaining § 1983 actions should not be able to apply state policies such as notice of claim requirements, which do not have any federal counterpart and which are not essential to the conduct of the litigation.

C. The Use of State Notice of Claim Requirements Is Inconsistent with the Purposes of § 1983.

Even when there is a "deficiency" in federal law, courts are only required to borrow a state policy that is appropriate in light of the purposes of § 1983. *Burnett v. Grattan*, 468 U.S. 42, 52-53 (1984). Moreover, a borrowed state policy must also be examined under the inconsistency clause of § 1988, *see id.* at 53 n.15, and must be rejected if the state policy is inconsistent with § 1983's purposes of compensation and deterrence. *See also Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978).

In determining whether a particular state policy is appropriate for purposes of borrowing, the District of Columbia Circuit noted that "[s]tate law rules are borrowed out of the need to effectuate federal policies in the face of incomplete federal law, and they are not borrowed if they would incorporate into federal law balances of interests that are inconsistent with the policies underlying the federal action." *Brown*, 742 F.2d at 1504.

In finding the notice of claim statute applicable to § 1983 actions, the Wisconsin Supreme Court stated, "that the primary purpose of a notice of claim statute is to give the municipality the opportunity to attempt to compromise the claim and effect settlement before the parties are forced to proceed with a lengthy or costly lawsuit." (A-9)

That objective, though laudable, has little relevance to § 1983 cases. The notice of claim requirement is part of a statutory scheme that places a $50,000 limit on damages that may be recovered from municipalities. *See* Wis. Stat. Ann. § 893.80(3) (West 1983). That ceiling is inapplicable to § 1983 actions, *see Thompson v. Village of Hales Corners*, 115 Wis.2d 289, 340 N.W.2d 704 (1983), but the administrative mechanism under the notice of claim statute is not adapted to § 1983 claims which generally involve larger amounts and which "belong in court." *Burnett*, 468 U.S. at 50.

Moreover, notice of claim requirements burden the § 1983 cause of action. Commentators have characterized them as "often operat[ing] functionally as a trap for the unwary claimant," S. Sato & A. Van Alstyne, *State and Local Government Law* 792 (2d ed. 1977). Indeed, Judge Breitel of the New York Court of Appeals described them as a "mousetrap" except for the "practitioner who is skilled in tort case or claims against municipalities." *Murray v. City of New York*, 30 N.Y.2d 113, 121, 282 N.E.2d 103, 108, 331 N.Y.S.2d 9, 16 (1972) (Breitel, J., concurring). Finally, a former Corporation Counsel for the City of New York has characterized notice of claim requirements as a "lawyer's nightmare" and observed that even sophisticated accident-case lawyers occasionally get caught in the New York " 'mousetrap,' its sub-mousetraps . . . and their analogues all over the nation, which protect local governments from liability for their negligence." Richland, *Municipal Law: Government Mousetraps and Attorney Malpractice*, N.Y.L.J., at 1, col. 1 (Dec. 9, 1987).

The Wisconsin Supreme Court identified the primary purpose of the notice of claim requirements as "prevent-[ing] needless litigation and . . . sav[ing] unnecessary expenses and costs by affording an opportunity amicably to adjust all claims against municipal corporations before

suit is brought." (A-9) This Court, however, in *Burnett*, 468 U.S. 42 (1984), rejected a similar argument in support of the Maryland six-month statute of limitation based on the limitations period for filing administrative claims of employment discrimination. Maryland had claimed an interest in promptly identifying and resolving claims to protect public officials from unfounded and often stale claims, see *id.* at 54, but this Court rejected that argument as being "manifestly inconsistent with the central objective of the Reconstruction-Era civil rights statutes, which is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Id.* at 55.

III. THE USE OF STATE NOTICE OF CLAIM REQUIREMENTS IN § 1983 LITIGATION BURDENS THE LITIGATION OF § 1983 CLAIMS.

In reviewing state court judgments that rely on state law grounds, this Court can review both the adequacy and the independence of the state grounds. *See Michigan v. Long*, 463 U.S. 1032, 1038 (1983). State court judgments based upon state "procedures" that burden the litigation of federal claims do not rest upon adequate state grounds. *See, e.g., Liner v. Jafco, Inc.*, 375 U.S. 301, 304-06 (1964) (state mootness requirements); *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 296 (1949) (burdensome state pleading requirements); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923). Nor may state courts apply state policies that provide almost unlimited discretion on whether to reach federal claims. *See Sullivan v. Little Hunting Park*, 396 U.S. 229, 234 (1969) (rule concerning notice for reviewing transcripts).

This Court has also refused to rely on state procedural defaults that prevent the implementation of federal constitutional rights, when the application of state policies would "force resort to an arid ritual of meaningless form

. . . and further no perceivable state interest." *James v. Kentucky*, 466 U.S. 341, 349 (1984). In *James*, this Court held that a defendant whose lawyer requested an "admonition" rather than an "instruction" to the jury that no emphasis be given to the defendant's failure to testify was entitled to have his federal claims considered despite the state policy distinguishing "admonitions" from "instructions."

In the present case, within a few days of the incident Milwaukee's highest ranking police official, Police Chief Breier, received a letter from an Alderman advising him of the incident and requesting an investigation. *See* Ex. 35. Moreover, within hours of the incident, an extensive internal police investigation was begun. Nonetheless, the Wisconsin Supreme Court held that the alternative "actual notice" permitted under Wisconsin law was not provided.

It is difficult to identify any legitimate state interest that is furthered by requiring Felder to do more than was done in the present case. The Wisconsin notice of claim requirement provides municipalities with the opportunity to investigate and settle claims. It also limits municipal liability by requiring that notice be provided far in advance of the limitations period applicable to similar suits against non-municipal defendants. The present case, however, does not involve the typical tort claim governed by notice of claim requirements. Rather, it involves a serious allegation of police abuse in violation of federal constitutional protections. An actual investigation was carried out, and the defendants and their municipal employer have had every opportunity to attempt to settle the case despite the absence of a formal notice of claim. Thus, the use of the strict notice of claim requirement to dismiss Felder's § 1983 action would "force resort to an arid ritual of meaningless form."

The California Supreme Court recognized that state grounds may not be used to burden § 1983 actions in *Wil-*

liams v. Horvath, 16 Cal.3d 834, 841, 548 P.2d 1125, 1129-30, 129 Cal. Rptr. 453, 457-58 (1976), when it rejected the application of the state notice of claim requirement to state court § 1983 litigation, noting that "[t]he purposes underlying section 1983 . . . may not be frustrated by state substantive limitations couched in procedural language."

Likewise, Justice Bablitch, in his dissenting opinion below, characterized the 120-day notice of claim requirement as a "subtlety of state procedural law that must give way to the vindication of federal rights in state courts," (A-19) and this Court should reject the application of the notice of claim requirement to plaintiff's § 1983 action.

IV. THE APPLICATION OF STATE NOTICE OF CLAIM REQUIREMENTS TO STATE COURT § 1983 LITIGATION IS INCONSISTENT WITH IMPORTANT PRINCIPLES OF FEDERALISM.

The decision of the Wisconsin Supreme Court applying the notice of claim requirement to § 1983 litigation conflicts with an almost unbroken line of federal court cases.[27] The Wisconsin Supreme Court acknowledged this

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[27]The United States Courts of Appeals for the Second, Fifth, Ninth, Tenth, Eleventh and District of Columbia Circuits have all rejected the application of state notice of claim requirements to § 1983 litigation. *See Brandon v. Board of Ed. of the Guilderland Cent. School Dist.*, 635 F.2d 971, 973 n.2 (2d Cir. 1980); *Ehlers v. City of Decatur*, 614 F.2d 54, 56 (5th Cir. 1980); *Willis v. Reddin*, 418 F.2d 702 (9th Cir. 1969); *Donovan v. Reinbold*, 433 F.2d 738, 741 (9th Cir. 1970); *Rosa v. Cantrell*, 705 F.2d 1208, 1221 (10th Cir. 1982), *cert. denied*, 464 U.S. 821 (1983); *Majette v. O'Connor*, 811 F.2d 1416, 1418 (11th Cir. 1987). *Cf. Brown v. United States*, 742 F.2d 1498, 1500 & n.2 (D.C. Cir. 1984) (en banc) (rejecting application of District of Columbia six-month notice of claim requirement to "constitutional tort" claims, including *Bivens* and § 1983 actions), *cert. denied*, 471 U.S. 1073 (1985). *But see Dearv v. Three Un-Named Police Officers*, 746

(Continued on following page)

line of cases but treated their applicability to state court § 1983 actions as "arguably minimal, if not nonexistent." (A-11) The state court then noted that plaintiffs who failed to comply with notice of claim requirements could bring their § 1983 actions in federal court. (A-12)

The decision of the Wisconsin Supreme Court, if permitted to stand, will discourage plaintiffs from litigating § 1983 claims in state courts. By interpreting § 1983 to permit state courts to use policies not applicable in federal courts, the Wisconsin Supreme Court effectively forces § 1983 litigation into federal courts. When § 1983 plaintiffs in Wisconsin, for whatever reasons,[28] do not file notices

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F.2d 185, 189 n.2 & 193 (3d Cir. 1984) (failure to comply with the notice of claim requirement of the Virgin Islands Tort Claims Act bars § 1983 claim against the Virgin Islands).

Virtually all the district courts that have addressed this issue have also rejected the application of notice of claim requirements to § 1983 litigation. *See* Petition for Certiorari, at 15 n.9 (listing district court decisions).

[28]At the time plaintiff filed his Second Amended Complaint on March 8, 1984, there were no reported decisions requiring compliance with notice of claim statutes in § 1983 litigation. Moreover, state and federal courts in Wisconsin had explicitly rejected the use of notice of claim requirements in § 1983 actions. *See Perrote v. Percy*, 452 F.Supp. 604, 605 (E.D. Wis. 1978); *Mathias v. City of Milwaukee Dep't of City Dev.*, 377 F.Supp. 497, 500 (E.D. Wis. 1974); *Doe v. Ellis*, 103 Wis.2d 581, 309 N.W.2d 375 (Ct. App. 1981).

Although the Seventh Circuit had not directly addressed the issue, in *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974), Justice (then Judge) Stevens rejected the application of the Illinois Tort Immunity Act, Ill. Rev. Stat. Ch. 85, §§ 1-101 *et seq.* (1969) which contained a notice of claim requirement, *see* Ch. 85, § 8-102, *repealed by* Pub. Act 84-1431, art. 1, § 3 (1986), to § 1983 litigation in federal courts as a matter of federal law. *See also Luker v. Nelson*, 341 F.Supp. 111, 116-19 (N.D. Ill. 1972) (application of notice of claim requirement to § 1983 actions rejected as a matter of state law); *Firestone v. Fritz*, 119 Ill. App.3d 685, 456 N.E.2d 904 (1983) (same).

of claim within 120 days of an incident, they will have little choice but to file their § 1983 actions in federal courts.[29]

In construing § 1983 similarly in state and federal court, this Court has been mindful of the implications on federalism of permitting state courts to read § 1983 more narrowly than federal courts. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), for example, this Court relied on considerations of federalism to hold that attorney fees were available to prevailing parties in state court § 1983 litigation. Justice Brennan, writing for the majority, noted that "[i]f fees were not available in state courts, federalism concerns would be raised because most plaintiffs would have no choice but to bring their complaints concerning state actions to federal courts." *Id.* at 11 n.12. Similarly, if state courts can impose conditions on litigating § 1983 cases that do not apply in federal courts, serious federalism concerns would be raised because plaintiffs would avoid filing their § 1983 claims in state courts.[30]

Most § 1983 litigation has taken place in federal courts since *Monroe* began the modern era of § 1983 litigation. In recent years, however, an increasing number of plaintiffs have filed § 1983 actions in state courts, and an important

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[29]Plaintiffs who do not file timely statutory notices may comply with §893.80 if there is "actual notice" of the claim and the plaintiffs show that defendants were not prejudiced. (A-12--A-13) Nonetheless, few plaintiffs will risk the uncertainty of filing § 1983 actions in the Wisconsin state courts after the expiration of the 120-day statutory period.

[30]In addition, plaintiffs to whom the federal courts are closed because of limitations on the power of federal courts, *see, e.g., Green v. Mansour*, 474 U.S. 64 (1986) (eleventh amendment); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) (comity), would have no available forum to litigate § 1983 claims if they had not complied with state notice of claim requirements.

state court § 1983 practice has begun to develop.[31] The application of notice of claim requirements to state but not federal court § 1983 litigation, however, will have the inevitable result of arresting this development.

This issue, of course, does not simply involve federal court caseloads. Rather, it raises more important questions about the role of state courts in our system of judicial federalism. For state courts to play their proper role in enforcing federal rights, plaintiffs should not be discouraged from filing § 1983 claims in state courts. The Oklahoma Supreme Court recognized this facet of federalism in *Willborn v. City of Tulsa*, 721 P.2d 803 (Okla. 1986), when it refused to exclude from the Oklahoma courts § 1983 actions brought by plaintiffs who had not complied with the notice of claim requirement.

> Consistent with our system of judicial federalism, which provides litigants with a double-barreled system of judicial protection, the remedy provided by § 1983 may be available even if the state remedy is barred by the statute of limitations under the Political Subdivision Tort Claims Act. *Id.* at 805 (footnote omitted).

By requiring plaintiffs in state court § 1983 litigation to comply with the notice of claim statute, the Wisconsin Supreme Court departed from these basic principles and erected a barrier that limits access to state courts and forces § 1983 litigation into federal courts.

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[31]*See Steinglass, The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. Miami L. Rev. 381 (1984). There are no available statistics on the volume of § 1983 litigation in state trial courts, but the increase in reported state appellate court opinions suggests the emergence of a significant state court § 1983 practice. *See id.* at 434-35 & nn. 266 & 269.

V. THE TENTH AMENDMENT DOES NOT REQUIRE THE USE OF STATE NOTICE OF CLAIM POLICIES IN STATE COURT § 1983 LITIGATION.

In requiring § 1983 plaintiffs to comply with the state notice of claim statute, the Wisconsin Supreme Court did not consider the impact on federalism of forcing § 1983 litigation into the federal courts. Rather, the court conceded that § 1983 plaintiffs who were excluded from state courts could file § 1983 actions in federal court but viewed this as the result of the tenth amendment which barred Congress from "prescrib[ing] the procedural scheme under which [federal] claims may be heard in state court."[32] (A-12)

The tenth amendment limits the extent to which the federal government may impose federal policies on state institutions, and this Court has commented on the difficulty of defining "the nature and content of those limitations." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985). Although there may be federal regulations of the state judicial process that do not pass constitutional muster, the rejection of notice of claim requirements in the state court litigation of § 1983 actions does not come close to invading that core of sovereignty that states retain. Thus, it is not necessary in this case "to identify or define what affirmative limits the constitutional structure might impose on federal actions affecting the States. . . ." *Id.* at 556.

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[32]In reaching this conclusion, which it apparently based on the tenth amendment, the Wisconsin Supreme Court expressly relied on *Kramer* v. *Horton*, 128 Wis.2d 404, 383 N.W.2d 54, *cert. denied*, 107 S.Ct. 324 (1986), its § 1983 exhaustion case. (A-8; A-12) Neither *Kramer* nor the present case, however, discusses or even cites *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), or any of this Court's tenth amendment cases.

This Court has not directly addressed whether the tenth amendment ever prohibits Congress from regulating "procedural" attributes of federal actions in state courts. The Wisconsin Supreme Court's conclusion, however, is inconsistent with decisions of this Court requiring state courts that entertain federally-created actions to follow federal policies. *See, e.g., Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359 (1952) (trial by jury); *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949) (pleading requirements); *Garrett v. Moore-McCormick Co.*, 317 U.S. 239 (1942) (burden of proof).

Moreover, this Court has refused to apply the tenth amendment to limit the power of the federal government to set the agenda for other state institutions. In *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982), this Court rejected Mississippi's tenth amendment challenge to the Public Utilities Regulatory Policies Act of 1978. The act required states to consider certain energy-saving approaches to public utility rate-making. In reviewing this issue, the Court relied on *Testa v. Katt*, 330 U.S. 386 (1947), which required state courts to entertain a federally-created cause of action. Because Mississippi had chosen to regulate public utility rates, this Court upheld the federal requirement. *Cf. Puerto Rico v. Branstad*, 107 S.Ct. 2802 (1987) (federal courts may order state governors to perform federal duties involving extradition).

The requirement that a prospective litigant file a notice of claim with the clerk of the local legislative body before commencing a civil action is hardly an "indisputabl[e] 'attribute of state sovereignty.'" *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981). Nor would a decision rejecting notice of claim requirements in state court § 1983 litigation "directly impair [the State's] ability 'to structure integral operations in areas of traditional governmental functions.'" *Id.*

Any impact on state courts that might flow from giving § 1983 plaintiffs direct access to state courts without regard to notice of claim requirements is likely to be minimal and indirect. The volume of state court § 1983 litigation pales in comparison to the volume in federal court, and § 1983 litigation will continue virtually unabated even if states can apply notice of claim requirements in their own courts. Moreover, most § 1983 plaintiffs will attempt to comply with notice of claim requirements anyway to preserve their state law claims. *Cf. Wilson v. Garcia*, 471 U.S. 261, 285 (1985) (O'Connor, J., dissenting) (discussing statutes of limitations). Finally, state notice of claim requirements do not affect what actually takes place in court, and the only potential impact on state courts of a decision rejecting the use of notice of claim requirements is a small increase in state court § 1983 litigation in those few states that require § 1983 plaintiffs to file notices of claim.

Likewise, the impact on other branches of state government is also minimal. Local governmental bodies will lose the "opportunity" to quickly investigate and compromise § 1983 claims. That impact may be significant in traditional municipal tort litigation involving defective sidewalks, roads, bridges and playgrounds. *See generally* Brochard, *Government Liability in Tort*, 34 Yale L.J. 229, 229-40 (1925). Notice of claim requirements, however, have little, if any, relevance to § 1983 actions involving allegations of excessive force and other serious constitutional violations. Section 1983 litigation, as Judge Easterbrook has noted, *see Kirchoff v. Flynn*, 786 F.2d 320, 323-24 (7th Cir. 1986), is significantly more complex than traditional tort litigation. Section 1983 cases often involve allegations of serious governmental misconduct, and plaintiffs must usually prove more than mere negligence to prevail. *See, e.g., Daniels v. Williams*, 474 U.S. 327 (1986); *Tennessee v. Garner*, 471 U.S. 1 (1985); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Washington v. Davis*, 426 U.S. 229

(1976). Moreover, § 1983 litigation frequently involves defendants whose professional reputations and careers are threatened because of the seriousness of the alleged violations. Thus, threshold issues of liability are as likely to be contested as are issues of damages, and, not surprisingly, § 1983 cases are among the most difficult to settle. Notice of claim requirements do little to advance the settlement of such cases.

To the extent the tenth amendment requires a balancing approach in which the strengths of the federal and state interests are compared, *see Garcia*, 469 U.S. at 562 (Powell, J., dissenting), the federal interest in guaranteeing litigants with federal claims direct access to state courts outweighs any state interest in establishing special preconditions for raising federal claims in state courts.

The state courts play a fundamental role in our system of judicial federalism. Congress was not required to establish inferior federal courts, and the Constitution contemplated the possibility of state courts being the only courts in which federal causes of action could be tried. Moreover, prior to the creation of federal question jurisdiction in 1875, *see* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, state courts were the principle forums in which most federal claims were raised. *See generally* Gibbons, *Federal Law and the State Courts 1790-1860*, 36 Rutgers L. Rev. 399 (1984). Any interpretation of the tenth amendment that prohibits Congress from regulating the remedial attributes of federal claims that are litigated in state courts ignores this fundamental aspect of our federal judicial system.[33]

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[33]This Court has also noted that "the sovereignty of the States is limited by the Constitution itself." *Garcia*, 469 U.S. at 548. Whatever limitations on the power of Congress under

(Continued on following page)

CONCLUSION

For these reasons, the judgment and opinion of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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(Continued from previous page)

the Commerce Clause remain after *Garcia*, legislation enacted under the authority of § 5 of the fourteenth amendment, like § 1983, *see Mitchum v. Foster*, 407 U.S. 225, 238 (1972), is subject to fewer constraints. *Cf. Milliken v. Bradley*, 433 U.S. 267, 291 (1977).

No. 87-526

In The
Supreme Court of the United States
October Term, 1987

BOBBY FELDER,

Petitioner,

v.

DUANE CASEY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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QUESTION PRESENTED

Does it violate federal policy for a state to apply its notice of claim statute in state court actions brought under 42 U.S.C. § 1983?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF THE CASE

Respondents accept Petitioner's statement of the case, as supplemented by the following information concerning the decision by the Wisconsin Supreme Court. In this brief, references to the Appendix to the Petition for Certiorari, which contains the decision of the Wisconsin Supreme Court, are indicated by "A-," and references to the Joint Appendix are indicated by "JA-."

In its decision, the Wisconsin Supreme Court carefully analyzed and obviously relied heavily upon the decisions of two other state appellate courts, Indiana and New York, wherein a state notice of claim statute was held applicable to a federal cause of action brought in state court. In discussing *Clark v. Indiana Dep't of Public Welfare*, 478 N.E.2d 699 (Ind. Ct. App. 1985), *cert. denied*, 476 U.S. —, 106 S.Ct. 2893 (1986), the Wisconsin Supreme Court accepted the *Clark* court's position that such a claim statute

> ". . . is a procedural precedent which must be fulfilled before filing suit in state court. . . . Because it is a procedural precondition to sue, it overrides the procedural framework of sec. 1983 when the litigant chooses a state court forum." 478 N.E.2d at 702 (citations omitted).

Felder v. Casey, 139 Wis. 2d 614, 625, 408 N.W.2d 19, 24 (1987); A-10.

Similarly, the Wisconsin Supreme Court quoted the New York decision, *Mills v. County of Monroe*, 58 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, *cert. denied*, 464 U.S. 1018 (1983), wherein the New York Court of Appeals stated:

> "Although Congress established no timeliness or notice requirements to apply to section 1981 actions brought in Federal court, these courts have been in-

> structed that, when interstices or voids occur in the Federal law, they should borrow the applicable State rule of law so long as it is not 'inconsistent with the Constitution and laws of the United States' . . . . This court . . . does not find that the State's notice requirements are antithetical to the policy underlying the civil rights laws." 59 N.Y.2d at 309-10, 451 N.E.2d at 457 (quoting 42 U.S.C. sec. 1988; case citations omitted). Also, *see, Robertson v. Wegmann*, 436 U.S. 584, 588 (1978).

Felder, 139 Wis. 2d at 625-26, 408 N.W.2d at 24; A-10.

The Wisconsin Supreme Court also discussed its prior decisions on the beneficial purposes served by Wis. Stat. § 893.80 (1985-86), referring to *Patterman v. City of Whitewater*, 32 Wis. 2d 350, 145 N.W.2d 705 (1966) and *Harte v. City of Eagle River*, 45 Wis. 2d 513, 173 N.W.2d 683 (1970). The court stated:

> It has been said that the primary purpose of a notice of claim statute is to give the municipality the opportunity to attempt to compromise the claim and effect settlement before the parties are forced to proceed with a lengthy or costly lawsuit.

Felder, 139 Wis. 2d at 624, 408 N.W.2d at 23-24; A-9.

The Wisconsin Supreme Court went on to point out that:

> The remedial and deterrent purposes underlying sec. 1983 actions are not frustrated simply because a state court litigant must abide by state court procedures. The notice of claim statute does not operate to limit the amount that a plaintiff might recover for a violation of his or her civil rights. Nor does the notice requirement operate to preclude a plaintiff's possibility for recovery.

Id. 139 Wis. 2d at 628, 408 N.W.2d at 25 (footnote omitted); A-12.

Finally, it should be noted that, having concluded that Wis. Stat. § 893.80 (1985-86) is a condition precedent to the bringing of a federal civil rights action in a Wisconsin state court, the Wisconsin Supreme Court then concentrated its attention upon whether Petitioner had complied with the notice of injury portion of the statute, as set forth in Wis. Stat. § 893.80(1)(a) (1985-86), and concluded that Petitioner had not.

Accordingly, the court was not called upon to decide whether Petitioner had complied with the second portion of that statute, i.e., Wis. Stat. § 893.80(1)(b) (1985-86), with respect to the filing of an "itemized statement of the relief sought." The record in this case is completely devoid of any such filing.

SUMMARY OF ARGUMENT

The Wisconsin notice of claim statute is a simple procedural requirement that does not place an unreasonable burden upon persons who sue local governments. The statute is followed routinely by persons who bring actions in Wisconsin state and federal courts against local governments to preserve their state law claims and to initiate the settlement procedure.

The notice of claim statute has been liberally construed by the Wisconsin Supreme Court to preserve *bona fide* claims. Wis. Stat. § 893.80(1)(a) (1985-86), which requires that a notice of circumstances of claim be filed within 120 days, does not bar a person who has not filed a timely notice from maintaining an action in state court if the local government had received actual notice of the claim and was not prejudiced by lack of earlier written notice.

Legitimate public interests are served by requiring compliance with the notice of claim statute in all actions brought in Wisconsin state courts. The State of Wisconsin has enacted the notice of claim statute and other laws to allow municipalities to promptly investigate claims, to take remedial action where appropriate, to provide some measure of financial stability, and to protect officers and employees of local governments from judgments and litigation expenses.

Under the principles of federalism, state courts hearing federal actions may apply state procedural rules that are not inconsistent with federal law, including remedial statutes such as 42 U.S.C. § 1983. Application of the Wisconsin notice of claim statute to a federal action brought in state court does not frustrate federal policy. Where a plaintiff complies with the procedural requirements of the notice of claim statute, Wisconsin state courts will then entertain the entire federal action, including all of its substantive attributes.

The notice of claim statute neither impedes immediate access to the federal courts, nor unreasonably burdens the prosecution of federal claims in state court because it provides a litigant with reasonable time to sue. Wis. Stat. § 893.80 (1985-86) is not a statute of limitations, and does not grant governmental immunity from liability. The Wisconsin Supreme Court has already decided that the immunity aspects of Wis. Stat. § 893.80 (1985-86) applicable to state tort litigation does not apply to federal civil rights actions heard in Wisconsin state courts.

Any analysis of 42 U.S.C. § 1988 is inapplicable to the question presented because no choice of law decision is made by the court. A state court may apply state procedural laws to all actions before it if, as in this case, the

application of the particular law does not frustrate federal policies.

ARGUMENT

I. THE WISCONSIN NOTICE OF CLAIM STATUTE DOES NOT PLACE AN UNREASONABLE BURDEN UPON PERSONS WHO CHOOSE TO PURSUE THEIR 42 U.S.C. § 1983 CLAIMS IN STATE COURT.

The Wisconsin notice of claim statute as construed and applied by the Wisconsin Supreme Court does not unreasonably burden claimants who choose to vindicate their federally protected rights in state court. It does, however, further an entirely different interest; that is, the interest of the state that legal disputes between its citizens and its political subdivisions be resolved, if possible, short of litigation. Before addressing the legitimate public interests served by Wis. Stat. § 893.80 (1985-86), and the reasons why that statute is not inconsistent with federal law, Respondents believe it is important that this Court understand both what the statute requires of claimants and how the Wisconsin Supreme Court has interpreted the statute. It is only against this background that this Court can properly analyze the various legal arguments concerning application of the Wisconsin notice of claim statute to federal civil rights cases brought in Wisconsin state courts.

Wis. Stat. § 893.80 (1985-86) provides that a suit may not be brought against a municipality or its employees unless two conditions are met. The first condition is stated in Wis. Stat. § 893.80(1)(a) (1985-86), which requires that within 120 days after the occurrence giving rise to a claim, a "written notice of the circumstances of the

claim signed by the party, agent or attorney" be served upon the municipality, and if the suit is to be brought against an employee, upon the employee. The provision does not specify what should be stated in the notice of the circumstances of the claim, but does require that it be signed by the person submitting it. The subsection, however, also contains a reprieve for claimants. Failure to give a notice of circumstances within 120 days does not bar an action on the claim if the municipality ultimately receives actual notice of the claim—there is no requirement that the employee receives actual notice of the claim—and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the municipality, or if an employee is being sued, to the employee. This provision, as discussed below, has been liberally construed by the Wisconsin courts.

In *Nielsen v. Town of Silver Cliff*, 112 Wis. 2d 574, 334 N.W.2d 242 (1983), the Wisconsin Supreme Court discussed the "notice of circumstances of claim" provision, stating:

> A claim is automatically preserved if written notice is given within 120 days after the event causing the injury. The receipt of timely written notice creates a conclusive presumption of no prejudice. However, noncompliance with the written notice requirement does not necessarily bar a claim. The statute provides that actual notice is sufficient to maintain a claim if the plaintiff shows that the governmental unit was not prejudiced. This method of preserving the claim does not need a time limit because a subjective showing of no prejudice assures that the statute's purpose has been satisfied regardless of when actual notice is received. This conclusion accords with the plain language of the statute which establishes no time limit for actual notice.

Id. 112 Wis. 2d at 580-81, 334 N.W.2d at 245.

Accordingly, the Wisconsin Supreme Court has construed Wis. Stat. § 893.80 (1985-86) in such a manner as to permit cases to go to trial even when the notice of circumstances of claim was either not given or given late. In *Nielsen*, the court held that the failure to give a written notice of circumstances of claim to the town within 120 days did not bar the action because the town received actual notice in the form of a claim in a letter from the claimant's attorney eight months after the incident, and the evidence was sufficient to sustain a finding of no prejudice to the town by the lack of timely written notice. In *Weiss v. City of Milwaukee*, 79 Wis. 2d 213, 228, 255 N.W.2d 496, 501 (1977), the court held that actual notice in the form of a claim for damages submitted in compliance with Wis. Stat. § 893.80(1)(b) (1985-86) given two years after the incident constituted compliance where the city was not prejudiced by the lack of earlier written notice.

The overriding principle the Wisconsin Supreme Court has adhered to with respect to consideration of such claims is that a " 'construction which preserves a *bona fide* claim so that it may be passed upon by a competent tribunal is to be preferred to a construction which cuts it off without a trial.' " *Sambs v. Nowak*, 47 Wis. 2d 158, 166, 177 N.W.2d 144, 148 (1970), *quoting with approval, Moyer v. City of Oshkosh*, 151 Wis. 586, 593-94, 139 N.W. 378, 381 (1913). The court's policy has been "to preserve a *bona fide* claim where there has been substantial compliance with a statute requiring notice." *Novak v. City of Delavan*, 31 Wis. 2d 200, 211, 143 N.W.2d 6, 12 (1966) (citations omitted).

The second provision is stated in Wis. Stat. § 893.80 (1)(b) (1985-86), which provides that a claim containing the address of the claimant and an itemized statement of the relief sought be presented to the city clerk. No action can be brought or maintained until a claim is filed and disallowed by the municipality either by service of a notice of disallowance upon the claimant or by the failure of the municipality to disallow the claim within 120 days after presentation. If the claimant receives a notice of disallowance from the municipality by registered or certified mail, an action must be brought within six months from the date of the service of the notice. The notice, however, is required to contain a statement informing the claimant of the six-month limitation.

In considering the Wis. Stat. § 893.80(1)(b) claim provision, the Wisconsin Supreme Court has construed the statute to require only a claim "definite enough to fulfill the purpose of the claim statute. . . ." *Gutter v. Seamandel*, 103 Wis. 2d 1, 10-11, 308 N.W.2d 403, 408 (1981). Applying this standard, the Wisconsin Supreme Court held that a demand for a lump sum in damages is a sufficiently itemized statement of relief sought, *Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 55, 357 N.W.2d 548, 554 (1984), and that a wife's claim for loss of companionship arising from her husband's injury need not be made separately from the husband's claim. *Nielsen*, 112 Wis. 2d at 582-83, 334 N.W.2d at 246. The requirement that suit be commenced within six months of disallowance does not create an unreasonable burden. Inasmuch as the claimant may choose when to file his claim, he may also freely decide when he will start his court action, so long as he does so within the outer boundary of the statute of limitations.

Binder v. City of Madison, 72 Wis. 2d 613, 622, 241 N.W.2d 613, 617 (1976).

Finally, the Wisconsin Supreme Court has required defendants to affirmatively plead noncompliance with the state claim statute in their answer. *See, e.g., Robe v. Outagamie County*, 72 Wis. 2d 492, 498, 241 N.W.2d 428, 432 (1976); *Majerus v. Milwaukee County*, 39 Wis. 2d 311, 317, 159 N.W.2d 86, 88-89 (1968). Of course, where, as in this case, there has been no attempt at compliance with the claim statute, the court is left with no choice but to dismiss the case.

In light of the Wisconsin Supreme Court's interpretation of the claim statute, it is clear that Petitioner's characterization of the statute as a "trap for the unwary claimant," and "a lawyer's nightmare" is unwarranted.

The original action was filed by Petitioner in Milwaukee County Circuit Court on April 2, 1982, almost nine months after his arrest. Had Petitioner sent the following letter to the city clerk sometime between July 4, 1981 and early November 1981, he would have complied with both subsections of the claim statute:

4060 North 15 Street
Milwaukee, Wisconsin

City Clerk
City Hall
Milwaukee, WI 53202

Dear City Clerk:

On July 4, 1981, Milwaukee police officers beat me up and arrested me for nothing. I want $100,000 [or any other specific sum, at Petitioner's option] for my injuries.

Very truly yours,
Bobby Felder (signature)

This simple letter would have initiated the City of Milwaukee's claim review procedure. An investigation of the claim would have been conducted, followed by an assistant city attorney's evaluation of the claim's merits for settlement purposes. Negotiations might then have taken place, and Petitioner's claim might, in fact, have been resolved without the necessity of filing the lawsuit. On the other hand, had the City of Milwaukee failed to settle the claim within the time allotted by the statute, Petitioner's decision to commence this action on April 2, 1982, would not have been affected.

This is not a case of ignorance by Petitioner of the notice of claim requirements. The defense of failure to comply with Wis. Stat. § 893.80 (1985-86) was raised in the defendant's answer to the April 2, 1982 complaint (and, in fact, also in the two subsequent answers). *Felder*, 139 Wis. 2d at 618, 408 N.W.2d at 21; A-4; JA-35. Accordingly, had Petitioner acknowledged his procedural error at that time rather than choosing to ignore it, he could have still complied easily with the notice of claim statute. Had he done so, he would also have been permitted to pursue the various state tort claims set forth in his complaint, claims which were subsequently dismissed at trial based precisely upon Petitioner's noncompliance with Wis. Stat. § 893.80 (1985-86), or he could have filed his action in federal court.[1]

Finally, Petitioner would have had to show only that the City was not prejudiced by the late notice, a simple

[1]Had he chosen to file his action in federal court, he nevertheless would have had to file a claim to maintain his pendent state tort claims. *Orthmann v. Apple River Campground*, 757 F.2d 909, 911 (7th Cir. 1985).

task under the facts of this case. Wis. Stat. § 893.80(1)(a) (1985-86) permits the action to proceed if the City had actual notice and was not prejudiced by the delay or lack of written notice. Had Petitioner filed a claim after he was notified by the defendants' answer of his noncompliance, the City would have received "actual notice of claim," albeit many months after his arrest.

Wis. Stat. § 893.80 (1985-86) is routinely complied with by Wisconsin claimants in cases ranging from a simple "trip and fall" on a defective sidewalk and those involving municipal vehicular accidents, to complex litigation involving design of the City's sewer system. In many civil rights cases, including those subsequently brought in federal court, potential plaintiffs also comply with the provisions of Wis. Stat. § 893.80 (1985-86), to effect a settlement and, if unsuccessful, to preserve their pendent state claims. Irrespective of the complexity of a particular case, however, compliance with the notice of claim statute remains a simple task. Indeed, the vast majority of claims made are presented by claimants unrepresented by counsel through letters as simple as the one postulated in this brief.

II. THE WISCONSIN NOTICE OF CLAIM STATUTE FURTHERS LEGITIMATE PUBLIC INTERESTS.

The State of Wisconsin has decided that it serves a valid public purpose to create a means whereby legal disputes between its subdivisions and its citizens can be resolved short of litigation. The claim statute is part of a larger statutory scheme enacted by the State of Wisconsin to address not only the issue of how a claim is to be pur-

sued against a municipality but also how it is to be paid, who is to pay it and who is to bear the legal expense should the claim fail to be settled and litigation ensues.

Under state law political subdivisions of the state pay any judgment entered against its officers or employees arising out of acts committed within the scope of their employment. Wis. Stat. § 895.46 (1985-86). This statute further provides that in the event of such litigation, the political subdivision must either provide an attorney to represent the officer or employee, or, if it fails to do so, to pay the officer or employee's attorney's fees. *Beane v. City of Sturgeon Bay*, 112 Wis. 2d 609, 615, 334 N.W.2d 235, 238 (1983).

In effect, Wis. Stat. § 895.46 (1985-86) requires a municipality to pay a civil rights judgment awarded against a municipal officer or employee and to bear the cost of defense, irrespective of the outcome, even if the municipality itself did not violate the civil rights law. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1271 (7th Cir. 1984). Wis. Stat. § 895.46 (1985-86) represents the judgment of the state that when its citizens are injured or deprived of a state or federal right by public officials or employees, the citizen should receive compensation, and at the same time, the public official or employee should not bear the cost of the judgment or the defense. *Horace Mann Ins. Co. v. Waukesha Bd. of Educ.*, 88 Wis. 2d 385, 389-90, 276 N.W.2d 761, 764-65 (1979). These decisions made by the State of Wisconsin expose its subdivisions to large liability and defense costs. The notice of claim statute, Wis. Stat. § 893.80 (1985-86), furthers the public interest by assisting municipalities in controlling those costs.

The "notice of circumstances of claim" provision of Wis. Stat. § 893.80 (1985-86), stated in subsection (1)(a), also furthers a public interest greater than the control of costs, which is the prevention of further harm. The sooner the municipality receives notice of a claim, whether it be a dangerous pothole or an arrest policy in the police department, the sooner the municipality can fully investigate the circumstances and, if appropriate, act to insure that the dangerous pothole is filled or the policy in violation of the federal civil rights law is corrected.

The claim portion of the statute, Wis. Stat. § 893.80 (1)(b) (1985-86), furthers the public interest by allowing claimants to present their claims directly to the governing body, in this case the Common Council of the City of Milwaukee.

> "Statutory . . . provisions requiring presentation of claims or demands to the governing body of the municipal corporation before an action is instituted are in furtherance of a public policy to prevent needless litigation and to save unnecessary expenses and costs by affording an opportunity amicably to adjust all claims against municipal corporations before suit is brought."

Patterman, 32 Wis. 2d at 357, 145 N.W.2d at 708-09 (citation and footnote omitted).

This Court, since its decision of *Parratt v. Taylor*, 451 U.S. 527 (1981), has repeatedly discussed the value of meaningful *post hoc* procedures (albeit in a procedural due process context), recognizing that such procedures might even, in appropriate cases, satisfy due process requirements and thereby preclude action under

42 U.S.C. § 1983. Although the issue of adequate post-deprivation remedies is not before the Court in this substantive due process case, simple procedural mechanisms such as Wis. Stat. § 893.80 (1985-86) can hardly be characterized as repugnant to the purposes of a federal law specifically passed to provide both compensation for injury and deterrence from future violations. Indeed, it is difficult to contemplate how a state law which allows a claimant who so chooses to meet with a committee composed of members of the governing body and present his grievance for consideration can be said to undermine those federal purposes.

Wis. Stat. § 893.80 (1985-86) also furthers the public interest in maintaining the financial stability of its local governmental units by requiring claimants to specifically state the dollar amount of their claim. It permits municipalities to more accurately measure their future liabilities and expenses, which in turn allows them to more accurately budget and set the tax rate, reserve current income to meet future liabilities, and, where possible, obtain insurance coverage.

Finally, in those instances where a claim has not been resolved pursuant to Wis. Stat. § 893.80 (1985-86), litigants can expect an earlier hearing of their cases by the Wisconsin state courts. The judicial economy achieved because of Wis. Stat. § 893.80 (1985-86) makes it more likely that those cases will not be delayed by other cases ripe for settlement pursuant to Wis. Stat. § 893.80 (1985-86).

III. THE WISCONSIN NOTICE OF CLAIM STATUTE IS NOT INCONSISTENT WITH FEDERAL LAW.

When the state law does not conflict with the Constitution or a federal law, this Court has applied the state law. *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 222-23 (1916). In that case, this Court upheld a Minnesota law that provided that a case may be decided by five-sixths of a jury if the case has been under submission to a jury for a period of 12 hours without a unanimous verdict. *Id.* The Court held that because the Seventh Amendment, which requires a unanimous verdict in federal court, did not apply to the states, there is no conflict with the state rule and accordingly the state court is free to apply the state rule to an action brought under the Federal Employer's Liability Act. *Id.* This Court stated the principle that a lawfully enacted law of a state is not to be struck down on the basis of a void in federal law:

> [L]awful rights of the citizen, whether arising from a legitimate exercise of state or national power, unless excepted by express constitutional limitation or by valid legislation to that effect, are concurrently subject to be enforced in the courts of the state or nation when such rights come within the general scope of the jurisdiction conferred upon such courts by the authority, state or nation, creating them.

Id. at 221.

The Wisconsin notice of claim statute does not conflict with federal law. The effect of the state law on the federal remedy is the same as if the Congress of the United States enacted a uniform governmental claim statute that would require claimants seeking money damages

from a governmental entity under a federally created cause of action to file a claim against the governmental entity prior to filing suit. The law would not be considered in any way inconsistent with the federal civil rights law because the law would have nothing to do with the particular type of claim being pursued, other than that the claim is being brought against the governmental entity. The public interests advanced in Section II of the Argument, *supra*, would aptly serve as the justification for the statute, which would become simply one of many federal procedural laws that litigants are required to follow to pursue their various claims in federal court.

In this case, the State of Wisconsin, and many other states, have passed just such a law. Petitioner maintains that the application of such a law precludes the state court from applying the entire federal cause of action, is inconsistent with this Court's decisions governing exhaustion of administrative remedies, statute of limitations, and immunity, is inconsistent with the purposes of 42 U.S.C. § 1983 and the principles of federalism, and finally that state courts are not compelled to apply state claim statutes by 42 U.S.C. § 1988 or the Tenth Amendment.

A. Wisconsin Courts Hear the Entire Federal Action.

Petitioner's argument that the Wisconsin courts do not consider the entire federal cause of action disregards the significant difference between a state notice of claim statute and other state laws that this Court has previously considered. The law applies only if the claimant chooses to file in state court. Compliance with the law is entirely in the hands of the claimant. This is unlike the state laws governing immunity, damages or burden of

proof, that, if applied in the context of a civil rights action, have an inextricable effect on the outcome and, once the choice of law decision is made, apply in both state and federal court. In contrast, notice of claim statutes, once complied with, have no effect on the application of the federal remedy by the state court. Although failure to comply with a notice of claim statute will result in dismissal of the federal action in state court, this result is no different than what would occur if other procedural rules, be they in state or federal court, are not complied with.[2]

Notice of claim statutes, therefore, are unlike the state laws passed upon by this Court in *Garrett v. Moore-McCormick Co.*, 317 U.S. 239 (1942); *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949); and *Dice v. Akron C. & Y. R.R.*, 342 U.S. 359 (1952), relied upon by Petitioner. In those cases, the state rule encroached upon a substantive federal right. The federal civil rights law and Wisconsin's notice of claim statute serve non-conflicting and, in some respects, identical public interests. A civil rights claimant who complies with the simple procedural provisions of Wis. Stat. § 893.80 (1985-86) may proceed in Wisconsin state courts with his entire federal cause of action, with all of its substantive attributes.

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[2]Dismissal of a plaintiff's claim can be based upon the following procedural statutes: Wis. Stat. § 803.06 (1985-86) (failure to serve named defendant); Wis. Stat. § 803.10 (1985-86) (failure to make substitution of parties); Wis. Stat. § 805.03 (1985-86) (failure to prosecute or to comply with statutes governing procedure in civil actions or to obey any order of the court); Fed. R. Civ. P. Rule 4(j) (failure to serve named defendant); Fed. R. Civ. P. Rule 16(f) (failure to obey scheduling or pretrial order); Fed. R. Civ. P. Rule 25(a)(1) (failure to make substitution of parties); Fed. R. Civ. P. Rule 37 (failure to comply with order of court); Fed. R. Civ. P. Rule 41(b) (failure to prosecute or to comply with procedural rules or any order of the court).

Petitioner's reliance on *El Paso and N.E. Ry. v. Gutierrez*, 215 U.S. 87 (1909), is also misplaced. Although this Court struck down the application of a territorial notice of claim statute in a state proceeding brought under the Federal Employer's Liability Act, this Court noted that it would have upheld the application of a claim statute had it been passed by a state as opposed to a territory because the authority of the federal government over the territories was plenary. *Id.* at 92-93, 96-97.

B. Wisconsin Courts Hear the Entire 42 U.S.C. § 1983 Action.

This same analysis distinguishes the cases relied upon by Petitioner brought pursuant to § 1983. In *Martinez v. California*, 444 U.S. 277, 284-85 (1980), this Court noted that the California immunity law would not apply to a federal cause of action brought in state court because immunity from a federal cause of action raises a question of federal law. *See also Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974). Accordingly, application of a state immunity rule, if broader than the federal immunity rule, would encroach upon a substantive federal right. This choice of law decision in favor of the federal law is the same irrespective of whether the case is in state or federal court, since neither state nor federal courts may apply a state rule that is contrary to the federal rule and encroaches upon a substantive federal right.

The holding in *Maine v. Thiboutot*, 448 U.S. 1, 10-11 (1980) that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, applied in state court merely

confirms that the express provisions of the civil rights law shall be applied by the state court when it hears a civil rights action. The fear expressed by this Court that a different rule would create a financial incentive for claimants to only file such cases in federal court is clearly not present in this case. Here, the financial incentives to the claimant are the same, irrespective of whether claimant files in state or federal court. Attorney's fees are available, and the Wisconsin Supreme Court has held that the limitation upon damages which ordinarily applies to a suit against governmental subdivisions do not apply in federal civil rights cases. *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 298, 340 N.W.2d 704, 708-09 (1983).[3]

The preparation and mailing of a simple document—far simpler than a complaint—can hardly be viewed as a disincentive on the same level as an inability to obtain attorney's fees. This is particularly true when one considers that if a civil rights claimant in federal court also pleads a pendent state claim such as negligence, malicious prosecution, loss of consortium, or intentional infliction of emotional distress, the claimant is still required to file a claim irrespective of the fact that the civil rights case is in federal court.

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[3] Wis. Stat. § 893.80(3) (1985-86) provides that: "The amount recoverable by any person for any damages, injuries or death in any action founded on tort . . . shall not exceed $50,000. . . . No punitive damages may be allowed or recoverable in any such action under this subsection."

C. Application of Wisconsin's Notice of Claim Statute is not Inconsistent with this Court's Decisions Governing Exhaustion of Administrative Remedies, Statute of Limitations and Immunity.

1. Exhaustion of administrative remedies.

Petitioner argues that the application by the state court of the state claim statute in a 42 U.S.C. § 1983 action is inconsistent with this Court's decision in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), in which this Court held that exhaustion of state administrative remedies is not required as a prerequisite to bringing an action pursuant to § 1983 in federal court. In arriving at its decision, this Court considered the legislative history of § 1983 and the legislative history of the Civil Rights Institutionalized Persons Act, 42 U.S.C. § 1997e, which created a narrow exception to the general no exhaustion rule. *Id.* at 507-09. Paramount in this Court's analysis was the conclusion that the legislative history of § 1983 indicated the 1871 Congress intended to protect the rights of citizens of the United States by giving them immediate access to the *federal courts*. *Id.* at 504. To require persons to exhaust their administrative remedies prior to obtaining access to the federal court would therefore frustrate this purpose. *Id.* at 509-10.

The Wisconsin claim statute does not prevent a person from immediate access to federal court. If, however, a person chooses to pursue his or her claim in the state court because of certain procedural advantages, then he or she is required to comply with the state notice of claim statute. There is nothing in the legislative history of § 1983 to indicate that it was the intent of the Congress

of 1871 to give its citizens immediate access to state courts and thereby declare invalid any state procedural laws serving legitimate public interests.

Even if this Court concludes that "immediate access" should be available to the state courts as well, the Wisconsin notice of claim statute does not impede access to the state courts in the same manner as a requirement that administrative remedies be exhausted. A person who chooses to litigate in state court need only file a claim and wait the requisite 120 days before filing a lawsuit. The claimant need not wait until administrative review of the claim is completed. The burdens of an exhaustion requirement, additional expense and inordinant delay, simply do not occur because of the imposition of a 120 day waiting period.

Petitioner has failed to show how the 120 day waiting period constitutes an unreasonable burden. In fact, many litigants choose to bring their civil rights cases in state court, in spite of the Wisconsin notice of claim statute, in order to obtain the advantages of a five-sixth jury verdict (Wis. Stat. § 805.09(2) (1985-86)), the opportunity to draw a jury from an urban population, and greater familiarity with state court procedures and personnel. Quite plainly, these state court advantages far outweigh any claimed procedural disadvantage which might arise by having to wait at most 120 days, particularly when few, if any, civil rights suits are brought so soon after the alleged violation.

2. Statute of limitations.

Petitioner argues that application of the state notice of claim statute effectively imposes a 120 day limitation upon § 1983 actions brought in state court and is

therefore inconsistent with this Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985). The Wisconsin notice of claim statute is not a statute of limitations. Wis. Stat. § 893.80(1)(a) (1985-86) requires a notice of the circumstances of the claim to be filed within 120 days; however, as discussed in Argument I, *supra*, the failure to do so is not fatal to the action.

Although failure to file the claim itself will bar the action, that is no different than noncompliance with the other procedural requirements. *See supra* note 2, at 17. The claim under Wis. Stat. § 893.80(1)(b) (1985-86) need only be filed in time to bring the action before the expiration of the applicable statute of limitation. *Schwetz v. Employers Ins. of Wausau*, 126 Wis. 2d 32, 34-35, 374 N.W.2d 241, 242-43 (Ct. App. 1985). The Wisconsin notice of claim statute, therefore, as it has been applied and interpreted by the courts of Wisconsin gives a party a reasonable time to sue.

3. Immunity.

Petitioner argues that Wis. Stat. § 893.80 (1985-86) is a state created immunity and therefore should not be applied in state court pursuant to this Court's decision in *Martinez*, 444 U.S. 277. Wis. Stat. § 893.80 (1985-86) is not a grant of governmental immunity.

Wis. Stat. § 895.43 (1963), the predecessor to Wis. Stat. § 893.80 (1985-86), was adopted by the Wisconsin Legislature through passage of 1963 Wis. Laws Ch. 198, in response to the Wisconsin Supreme Court's abrogation of governmental immunity from tort liability in *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). The legislature subsequently expanded the

notice of claim statute by adopting 1977 Wis. Laws Ch. 285, so that the notice of claim procedure applies to *all* claims, as opposed to just state tort claims. However, the "immunity" aspects of Wis. Stat. § 893.80 (1985-86), insofar as that statute applies to federal civil rights causes of action have, as discussed earlier, already been eliminated by the Wisconsin Supreme Court in *Thompson*, 115 Wis. 2d 289, 340 N.W.2d 704. The court stated in *Thompson*:

> State law cannot be used where its application would frustrate federal policies. The policy behind sec. 1983 civil rights actions is one of compensation for actual injury. Insofar as the state recovery ceiling prevents realization of that policy, it must give way. We conclude that the limitation on municipal liability set forth in sec. 893.80, Stats., has no application to a damage award under 42 U.S.C. sec. 1983.

Id. 115 Wis. 2d at 304, 340 N.W.2d at 711.

The *Thompson* court recognized that the awarding of attorney fees pursuant to 42 U.S.C. § 1988 are available to a prevailing plaintiff in a § 1983 action. *Id.* 115 Wis. 2d at 309, 340 N.W.2d at 713-14. Respondents also read *Thompson* as rejecting the "no punitive damages" immunity aspect of Wis. Stat. § 893.80(4) (1985-86) in § 1983 actions. No vestages of immunity remain within Wis. Stat. § 893.80 (1985-86).

D. 42 U.S.C. § 1988 Does Not Prohibit the Wisconsin Courts From Applying the Wisconsin Notice of Claim Statute.

Petitioner argues that application of the state claim statute conflicts with the provisions of 42 U.S.C. § 1988 as construed by this Court. The Wisconsin notice of claim

statute, however, is unlike the state laws this Court has considered in its interpretation of § 1988. The state claim statute is wholly independent of the civil rights statute. There is no necessity for a court, state or federal, to make reference to the state claim statute to dispose of issues necessarily addressed in the course of the application of the federal remedy. The cases, therefore, in which this Court made choice of law decisions pursuant to the directives of § 1988 do not address the issues raised by the state notice of claim statute. The state court does not "borrow" the state notice of claim statute to determine whether or not an action is properly before it. The state court merely applies the state procedural laws unless it finds that application of a particular law would frustrate federal policies.

Respondents do not argue that the federal law is deficient in its lack of a notice of claim provision, but simply that the state court properly applied the state claims law because the provisions are not inconsistent with the remedial purposes of the civil rights law.

CONCLUSION

The Wisconsin notice of claims statute furthers legitimate public interests without unreasonably burdening a plaintiff who chooses to pursue a federal civil rights remedy in state court. For the foregoing reasons, the judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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January 1988

No. 87-526

In The

Supreme Court of the United States

October Term, 1987

BOBBY FELDER,

Petitioner,

v.

DUANE CASEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL AND STATUTORY PROVISIONS:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

ARGUMENT

I. THE WISCONSIN NOTICE OF CLAIM REQUIREMENT CONFLICTS WITH THE ESSENTIAL NATURE OF THE § 1983 CAUSE OF ACTION AND BURDENS THE LITIGATION OF § 1983 CLAIMS IN THE WISCONSIN COURTS.

A. State Courts That Entertain § 1983 Actions May Not Impose State Policies That Conflict With The Essential Nature Of The § 1983 Cause Of Action.

In arguing for the application of notice of claim requirements to state court § 1983 litigation, the respondents do not dispute that state courts that entertain § 1983 action must hear the entire federal cause of action with all its essential attributes.[1] Rather, they label the Wisconsin notice of claim statute, Wis. Stat. Ann. § 893.80 (West 1983 & Supp. 1986) (hereinafter cited as "893.80"), as "a simple procedural requirement" and argue that the requirement is liberally construed by the Wisconsin courts, routinely complied with by claimants, and in furtherance of a legitimate public interest.[2] Brief for Respondents at 3.

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[1]Respondents' position is supported by three amici curiae briefs, including one filed by the International City Management Association and six other organizations of state, county and municipal governments and their officials. In responding to the arguments in this amici brief, petitioner will refer to these amici as the "City Management amici" and to their brief as the "City Management Amici Brief."

[2]The City Management amici concede that state policies may not regulate or control essential or central attributes of § 1983 but argue that state policies should be followed on "procedural" matters. City Management Amici Brief at 21. They then classify some "procedural" matters as "quasi-procedural" (i.e., choice of statutes of limitations) and argue that federal law controls these issues, *see id.* at 18, 22, but that state law controls "procedural" matters like notice of claim requirements. They never explain, however, the difference between "quasi-procedural" and "procedural" policies or why limitations periods are "quasi-procedural" but notice of claim requirements are not. This use of labels is of little assistance to courts that must decide cases.

This description, even if accurate, does not support the use of notice of claim requirements in state court § 1983 litigation. Section 1983 is a remedial statute intended to be "independently enforceable whether or not it duplicates a parallel state remedy." *Wilson v. Garcia*, 471 U.S. 261, 279 (1985). Congress enacted § 1983 during Reconstruction because of the ineffectiveness of state remedies, and *Wilson*, *Patsy v. Board of Regents of the State of Fla.*, 457 U.S. 496 (1982), and *Martinez v. California*, 444 U.S. 277 (1980), establish the essential features of § 1983 that apply in state and federal courts.

Respondents maintain that the Wisconsin notice of claim requirement does not operate as a statute of limitations because § 1983 plaintiffs may provide "actual notice" beyond the 120-day statutory period and need only submit an "itemized statement of the relief sought" under § 893.80(1)(b) in sufficient time to commence an action within the statute of limitations. Brief for Respondents at 22. This conclusion, however, ignores the fact that plaintiffs who fail to provide timely statutory notice have the burden of showing that the late notice was not prejudicial to either the governmental entity (regardless whether it is a litigant) or to any employees named as defendants. *Id.* at 5. Thus, plaintiffs in Wisconsin who do not provide timely statutory notices no longer have an unqualified right to bring § 1983 actions in the state courts. Moreover, even flexible notice of claim requirements that permit extensions of the time period operate as statutes of limitations.[3] *See Murray v. City*

[3]The close relationship between notice of claim requirements and statutes of limitations is apparent from a review of the 38 notice of claim statutes cited in the City Management Amici Brief, at 1a-2a. Approximately two-thirds of the statutes cited require notices to be filed within six months or less of the complained-of incident. However, in only five of the jurisdictions, including Wisconsin, does the cited statute contain a general provision permitting the late filing of notices. *See* Cal. Gov't Code § 911.4 (West 1980 & Supp. 1988); Me. Rev. Stat.

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of New York, 30 N.Y.2d 113, 121, 282 N.E.2d 103, 108, 331 N.Y.S.2d 9, 16 (1972) (Breitel, J., concurring) ("[T]he [notice of claim] statute is a harsh one and has the effect of a very short Statute of Limitations.").

The application of the Wisconsin notice of claim requirement to injunctive and damage actions against mu-

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Ann. tit. 14, § 8107 (1980); N.J. Stat. Ann. § 59:8-9 (West 1982); N.Y. Gen. Mun. Law § 50-e (McKinney 1986). *Cf.* Utah Code Ann. § 63-30-11 (1986 & Supp. 1987) (permitting late filing but only for minors, prisoners, and mentally incompetent persons without guardians). The New Jersey and New York statutes permit late filing but place the burden of showing good cause or otherwise justifying the late filing on the plaintiff and expressly give their courts discretion as to whether to accept late notices. *See* N.J. Stat. Ann. § 59:8-9 (West 1982); N.Y. Gen. Mun. Law § 50-e(5) (McKinney 1986). In California, the public body that is the target of the claim may grant leave to file a late claim, *see* Cal. Gov't Code § 911.6 (West Supp. 1988), although the courts also have discretion to extend the time. *See* Cal. Gov't Code § 946.6(a) & (e) (West Supp. 1988). *See also Dunston v. State*, 161 Cal. App.3d 79, 83, 207 Cal. Rptr. 196, 198 (1984).

State courts often have broad discretion to extend the time for filing notices. For example, the New York Court of Appeals has attributed the apparent inconsistencies among the many lower court decisions to the traditional reluctance of appellate courts to review exercises of discretion. *See Murray v. City of New York*, 30 N.Y.2d 113, 119, 282 N.E.2d 103, 107, 331 N.Y.S.2d 9, 14 (1972). *See also* Richland, *Municipal Law: Government Mousetraps and Attorney Malpractice*, N.Y.L.J., at 1, col. 1 (Dec. 9, 1987) (noting the more than 140 pages of annotations summarizing cases construing the New York notice of claim requirement).

One state addresses these issues by making compliance with its notice of claim statute truly voluntary and attaches no sanctions to the failure to file notices, *see* N.H. Rev. Stat. Ann. § 541-B:14 (1974 & Supp. 1986), and one state simply delegates to local government the authority to adopt notice of claim requirements. *See* Del. Code Ann. tit. 10, § 4013 (Supp. 1986).

The remaining statutes do not contain any language authorizing late claims, and one commentator has noted that "courts will generally be more insistent upon compliance with time deadlines than with other elements of notice." W. Valente, *Local Government Law* 907 (1980).

nicipalities and their employees[4] and the use of the 120-day waiting period make the statute resemble an impermissible exhaustion requirement. The 42d Congress, however, did not contemplate that plaintiffs would be *required* to resort to state remedies, including state administrative remedies,[5] and this Court in *Burnett v. Grattan*,

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[4]Even if Wisconsin can apply its notice of claim requirement to state court § 1983 litigation against municipalities, the state interests advanced by respondents do not justify the use of notice of claim requirements in § 1983 actions against municipal employees. In this case, the respondents, all of whom are City of Milwaukee police officers, were sued in their individual and official capacities. *See* Plaintiff's Second Amended Complaint, para. 10. (J.A. 11). The § 1983 claim against the respondents in their official capacities is the equivalent of a suit against the municipality, *see Brandon v. Holt*, 469 U.S. 464 (1985), but even if that claim must be dismissed, the § 1983 claim against the respondents in their individual capacities should not be.

In addition to Wisconsin, only ten of the 38 notice of claim statutes cited in the City Management Amici Brief (at 1a-2a) expressly require notices to be served on governmental entities in actions brought only against the employees. *See* Ariz. Rev. Stat. Ann. § 12-821 (Supp. 1987); Colo. Rev. Stat. § 24-10-109 (Supp. 1987); Idaho Code § 6-906 (Supp. 1987); Md. Cts. & Jud. Proc. Code Ann. § 5-404 (1984 & Supp. 1987); Minn. Stat. Ann. § 466.05 (West 1977 & Supp. 1988); Neb. Rev. Stat. § 23-2416.01 (Supp. 1987); N.Y. Gen. Mun. Law § 50-e (McKinney 1986); Or. Rev. Stat. § 30.275 (1984 & Supp. 1987); S.C. Code Ann. § 15-78-70(c) (Law. Co-op Supp. 1987); Utah Code Ann. § 63-30-11 (1986 & Supp. 1987). None of these statutes, however, go as far as Wisconsin's and require notices of claim to be served on *both* the governmental entity and the employees in suits only against the employees. *But see Poole v. Clase*, 476 N.E.2d 828, 831 (Ind. 1985) (construing Indiana law to require such notice).

[5]In applying the notice of claim requirement to state court § 1983 actions, the Wisconsin Supreme Court relied heavily on *Kramer v. Horton*, 128 Wis.2d 404, 383 N.W.2d 54, *cert. denied*, 107 S.Ct. 324 (1986), in which it had rejected the application of *Patsy v. Board of Regents of the State of Fla.*, 457 U.S. 496 (1982), to state court § 1983 litigation. In an effort to explain away that questionable reading of *Patsy*, the City Management amici suggest that the " 'no exhaustion' rule . . . [may be] more aptly considered simply part of the procedural background of adjudication in the federal court." City Management Amici Brief at 24. That conclusion, however, is erroneous, as the well established rule in federal court requires the exhaustion

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468 U.S. 42, 50 (1984), observed that the "dominant characteristic" of § 1983 actions is that "they belong in court."

Notice of claim requirements are also used to limit the liability of local governments and their employees. Respondents and the City Management amici effectively admit this by identifying various fiscal-related justifications for notice of claim requirements. *See* Brief for Respondents at 12; City Management Amici Brief at 28. Moreover, notice of claim requirements are part of legislative attempts to limit the extent of governmental liability, especially in light of the judicial abrogation of governmental immunity. The mere fact that the requirements only limit rather than preclude liability does not alter their character as state immunity policies.

In arguing for the use of notice of claim requirements in state court § 1983 litigation, the City Management amici rely on Professor Hart's observation that "federal law takes the state courts as it finds them." City Management Amici Brief at 8-9 (quoting Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)). This statement, which was adapted from the concurring opinion in *Brown v. Gerdes*, 321 U.S. 178, 190 (1944) (Frankfurter, J., concurring), has never been adopted by this Court, and *Gerdes* rejected the suggestion that state courts that voluntarily entertained suits asserting rights under federal statutes "could take jurisdiction of them but fail to apply any federal law in which those claims might be rooted." 321 U.S. at 186. Moreover, Professor Hart also cautioned that state rules need not be applied when they are "so rigorous as, in effect, to nullify the asserted rights." *See* Hart, *supra*.

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of adequate and available administrative remedies. *See McKart v. United States*, 395 U.S. 185, 193 (1969); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). *See also Patsy*, 457 U.S. at 518 (White, J., concurring). Only the nature of § 1983 and its unique legislative history support the rejection of exhaustion of administrative remedies requirements in § 1983 litigation.

Petitioner does not dispute the ability of state courts to apply the ordinary rules of practice and procedure in cases involving federal rights. *See John v. Paullin*, 231 U.S. 583, 585 (1913) (upholding the use of state rules for invoking the appellate jurisdiction of state courts). For example, when Congress adopts a set of rules or procedures that are uniquely designed to govern litigation in the federal courts, state courts need not follow them. *Peaches v. City of Evansville*, 180 Ind. App. 465, 468, 389 N.E.2d 322, 325 (1979) (state courts entertaining § 1983 actions need not follow the Federal Rules of Evidence), *cert. denied*, 444 U.S. 1033 (1980).

The history of FELA litigation makes clear that state courts entertaining federal causes of action are often prohibited from following state policies that could be characterized as "procedural." *See, e.g., Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359 (1952); *Wilkerson v. McCarthy*, 336 U.S. 53 (1949); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942). *Cf. Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984). Nor may state courts reject matters governed by uniform federal common law. *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490 (1980); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

In arguing that state courts may apply state "procedural" policies when entertaining § 1983 claims, respondents identify a number of state policies that state courts should be able to follow. *See* Brief for Respondents at 17 n.2 (describing policies on service, substitution of parties, failure to prosecute, and failure to comply with procedural or court rules). These policies, however, are all counterparts of federal policies that not only are uniquely applicable to federal court but also are essential for regulating the conduct of litigation. *See Brown v. United States*, 742 F.2d 1498, 1506 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1073 (1985). Notice of claim requirements, however, are conditions precedent to sue and have little in common with policies that regulate the actual conduct of litigation.

In addition, each of the "procedural" policies identified by the respondents is a general policy equally applicable in suits against *both* governmental and private defendants. Notice of claim requirements, on the other hand, provide special protections *only* to governmental defendants. This Court, however, has taken care to protect § 1983 plaintiffs from facially neutral state policies that benefit prospective defendants. For example, *Wilson v. Garcia*, 471 U.S. 261, 279 (1985), rejected the use of state tort claims acts for selecting the appropriate statute of limitations. Further, to assure that states not discriminate against § 1983 claims, *Wilson* required the use of the statute of limitations for general personal injury actions.[6] *Id.* Thus, respondents' case is significantly weakened because of Wisconsin's decision not to make its notice of claim requirement applicable to all civil litigation.[7]

The Wisconsin notice of claim requirement does not discriminate against § 1983 claims in the sense of treating § 1983 claims differently than state law claims against the same defendants. Nonetheless, the use of notice of claim requirements to protect those governmental defendants most likely to be defendants in § 1983 litigation has the impact of burdening § 1983 claims by tying § 1983 to state law remedies whose "ineffectiveness . . . led

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[6]The only full opinion by any federal appellate court supporting the use of notice of claim requirements in § 1983 litigation was the dissenting opinion in *Brown v. United States*, 742 F.2d at 1510. *Brown*, however, was decided prior to *Wilson*, and thus at a time when a strong argument could be made for looking to state tort claims acts for the appropriate limitations period.

[7]The City Management amici suggest that the rejection of notice of claim requirements in state court § 1983 litigation would preclude states from requiring mediation or non-binding arbitration in civil damage actions. City Management Amici Brief at 23. Such alternative dispute resolution requirements, however, would presumably differ from the Wisconsin notice of claim requirement in that the former would be applicable to *all* civil litigation and not only to those defendants most likely to be defendants in § 1983 actions, namely, governmental entities and their employees.

Congress to enact the Civil Rights Acts in the first place." *Wilson*, 471 U.S. at 279.[8]

B. Regardless Of The Applicability Of § 1988 To State Courts, The Wisconsin Notice Of Claim Requirement Impermissibly Burdens The State Court Litigation Of § 1983 Claims.

Respondents and the City Management amici argue that 42 U.S.C. § 1988 does not require the rejection of notice of claim requirements in state court § 1983 litigation. Petitioner, however, contends that § 1988 does apply in state courts, but, whether or not it does,[9] the

[8]The only state courts of last resort to address this issue since the decision in this case have rejected the decision below and unanimously held that state notice of claim requirements do not apply to § 1983 claims as a matter of federal law. *See Mellinger v. Town of West Springfield*, 401 Mass. 188, 515 N.E. 2d 584, (1987); *Fuchilla v. Layman*, — N.J. —, — A.2d — (Feb. 8, 1988), *aff'g* 210 N.J. Super. 574, 510 A.2d 281 (App. Div. 1986).

[9]The City Management amici suggest that this Court's reliance on § 1988 in *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), a state court proceeding under 42 U.S.C. § 1982, was dictum because the conclusion about damages could have been supported on the ground that § 1982 itself requires the use of federal damage principles. City Management Amici Brief at 19 n.19. Petitioner agrees that federal law supports the use of uniform federal damage policies in § 1982 and § 1983 cases, whether brought in state or federal court. It is a novel use of the concept of dictum, however, to suggest that this Court's conclusion was dictum because the Court could have reached the same result by alternative means. Moreover, the damage issues were an important aspect of *Sullivan*. This Court had held in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), that § 1982 prohibited private discrimination in matters affecting property. Section 1982 did not contain any express remedies, and *Jones* left open whether damages were available. *Id.* at 414 n.14. The *Sullivan* Court relied on *Bell v. Hood*, 327 U.S. 678 (1946), to conclude that a federal damage remedy could be implied from the federal statute rather than from the law of the forum state. The petitioner in *Sullivan* sought guidance as to the available damages, see Petitioner's Brief at 50-54, and this Court explicitly relied on § 1988 to provide the Virginia state courts and the litigants with such guidance. Subsequent decisions of this Court may have undercut *Sullivan's* open-ended approach to damage issues and the role it assumed for the dam-

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approach followed under § 1988 should also be applicable to state court § 1983 litigation.

In determining whether to apply state policies in § 1983 litigation, courts applying § 1988 follow a three-step inquiry. *Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984). Initially, courts must determine whether there is a deficiency or gap in federal law. If they find a deficiency, then they must consider whether a particular state policy is appropriate for borrowing in light of the purposes of § 1983. Finally, courts must address the closely related question of whether the borrowed policy is consistent with the purposes of § 1983.

These inquiries should also be made in state court § 1983 litigation. Regardless whether § 1988 applies in state courts, state courts must still define the federal cause of action and determine whether federal law is deficient. Obviously, state courts cannot apply federal policies that are only applicable in federal court (i.e., the federal rule on class actions and the federal statute on postjudgment interest), and therefore, state courts may apply § 1988 somewhat differently from federal courts. Nonetheless, state courts entertaining § 1983 actions may only use state policies that are "appropriate." *Cf. Wilson v. Garcia*, 471 U.S. 261, 265-66 (1985) (rejecting the New Mexico Supreme Court selection of the appropriate limitations period).

Likewise, at the third step, state and federal courts (whether applying § 1988 or federal common law principles) should reject state policies that are inconsistent with § 1983. In making this inquiry, however, courts are not limited to rejecting state policies that only violate specific federal constitutional or statutory provisions. If that were the only question, the inconsistency clause of § 1988 would have little meaning. Rather, the inquiry is

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age policies of the forum state, *see Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986); *Carey v. Piphus*, 435 U.S. 247 (1978), but that does not detract from the conclusion that § 1988 applies in state courts.

broader and requires courts to look for a conflict between state policies and the purposes of § 1983. *See Robertson v. Wegmann,* 436 U.S. 584, 590-91 (1978).

In examining the consistency of state policies with the purposes of § 1983, the inquiry is not confined to whether the plaintiff wins or loses. *See Robertson,* 436 U.S. at 593. Likewise, the consistency of a particular state policy with the purposes of § 1983 or its appropriateness in § 1983 litigation should not depend simply on whether the plaintiff might have been able to comply with the state policy. Rather, the inquiry should focus more broadly on the appropriateness of the particular policy in § 1983 litigation, and, in the case of state court litigation, on whether the state policy is either inconsistent with the purposes of § 1983 or burdens state court § 1983 litigation.[10]

In defending the application of the Wisconsin notice of claim requirement to state court § 1983 litigation, respondents contend that the requirement is a simple procedural condition on suit which is liberally construed by Wisconsin courts. A review of Wisconsin cases, including this case, however, suggests otherwise. As the trial court noted, there are both liberal and strict applications of the notice of claim requirement, *see* Dec. 6-8 (Mar. 8, 1985), and a common thread is the absence of clear standards to guide lower courts and litigants. *See Olsen v. Township of Spooner,* 133 Wis.2d 371, 379, 395 N.W.2d 808, 811 n.4 (Wis. App. 1986) (observing that "[o]pinions applying sec. 893.80(1)(a) have typically treated the prejudice question summarily, listing facts, then declaring whether these facts supported a finding of prejudice"),

[10]In *Board of Regents v. Tomanio,* 446 U.S. 478, 489-92 (1980), this Court reviewed considerations of federalism and uniformity in refusing to reject a borrowed state tolling policy. Considerations of federalism and the equitable administration of the law, however, require the rejection of state policies that burden state court § 1983 litigation and support the construction of § 1983 similarly in state and federal courts.

review denied, 134 Wis.2d 458, 401 N.W.2d 10 (1987). Moreover, the statute is often strictly applied. For example, the requirement of an "itemized statement of the relief sought" in § 893.80(1)(b), *see Gutter v. Seamandel,* 103 Wis.2d 1, 308 N.W.2d 403 (1981); *Pattermann v. City of Whitewater,* 32 Wis.2d 350, 145 N.W.2d 705 (1966), may be more difficult to meet than the applicable state and federal rules on pleading damages, neither of which limit plaintiffs to the amount of damages specifically pleaded in their prayer for relief. *See* Fed. R. Civ. P. 54(c); Wis. Stat. Ann. § 806.01(1)(c) (West 1977).

The most effective rebuttal of respondents' assertions about the liberal construction of the Wisconsin notice of claim requirement, however, is the present case. High level officials of the City of Milwaukee were aware of Bobby Felder's arrest and alleged beating within hours of the incident and initiated an investigation. The Wisconsin Supreme Court without reaching whether the failure to provide a statutory notice was prejudicial found that there was no "actual notice" within the meaning of the statute.[11]

Respondents also contend that petitioner could have easily filed a notice of claim after the respondent raised the issue.[12] Brief for Respondents at 10. A review of

[11]Even if the notice of claim requirement may generally be applied to § 1983 cases, its use in this case does not constitute an adequate state ground to support the dismissal of petitioner's § 1983 action. *See* Brief for Petitioner at 38-40.

[12]In cases involving allegations of police misconduct, criminal charges are often brought against the eventual § 1983 plaintiff. *See Police Misconduct: Law and Litigation* § 8.2(a) (Clark Boardman Co., Ltd. 1987). Although plaintiffs may not be barred from commencing § 1983 damage actions while such charges are pending, *cf. Deakins v. Monaghan,* 108 S.Ct. 523 (1988), it is not realistic to expect plaintiffs to initiate civil actions until the closely related criminal or other charges are resolved. In the present case, for example, the city ordinance disorderly conduct citation against the petitioner was not dismissed by the Milwaukee City Attorney's Office until January 12, 1982, more than six months after the incident that led to

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the proceedings below, however, places this suggestion in its proper context. Although the respondents did raise the notice of claim issue as an affirmative defense,[13] they made no motions concerning that defense within the time limitations of the scheduling order. When they finally moved to dismiss the action for non-compliance with the notice of claim requirement in a motion filed on Friday, February 22, 1985, ten days before trial, *see* Tr. 3 (Feb. 25, 1985), it was too late for the petitioner to provide the requisite notice and still give the city 120 days to consider his claim without jeopardizing the scheduled trial.[14]

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this action. *See* Plaintiff's Second Amended Complaint, para. 34 (J.A. 19). Thus, by the time this obstacle to initiating a § 1983 action was removed, the 120-day statutory period had expired, and petitioner's ability to comply with the notice of claim requirement depended on his establishing the absence of prejudice to the defendants.

Moreover, petitioner alleged that the investigation in this case was part of a racially-motivated conspiracy to cover up respondents' initial wrongdoing and interfere with his access to the state courts in violation of 42 U.S.C. § 1985(2). *See* Plaintiff's Second Amended Complaint, paras. 21; 29-33; 35; 52; 54-55 (J.A. 15-19; 23-24).

[13]The petitioner could not have served notices on nine of the ten respondents within the 120-day statutory period because petitioner only learned the identity of these respondents *after* the litigation had begun. *See* Complaint, para. 3 (naming unknown "Doe" defendants). Although this might justify a late filing in some jurisdictions, *see supra* note 3, the Wisconsin notice of claim requirement does not contain a "good cause" exception but only permits late filing when claimants prove the absence of prejudice to the defendants.

[14]The Wisconsin Supreme Court has characterized as "unseemly" the tactic of attorneys holding back notice of claim defenses so that plaintiffs can no longer remedy their failure to give notice. *See Figgs v. City of Milwaukee*, 121 Wis.2d 44, 56, 357 N.W.2d 548, 555 (1984). The facts of the present case illustrate how defendants can skillfully use notice of claim requirements to ambush plaintiffs and why that practice has come under criticism from commentators. *See*, e.g., J. Fordham, *Local Government Law* 1162 (rev. ed. 1975) (noting the unfairness of " 'sit[ting] out' the filing period").

Finally, to demonstrate the simplicity and reasonableness of the notice of claim requirement, respondents have drafted a letter that petitioner could have "sent . . . to the city clerk sometime between July 4, 1981 and early November 1981 to comply with both subsections of the claim statute." Brief for Respondents at 9. Therefore, ironically this "simple letter," *id.* at 10, *clearly* fails to meet the requirements of the notice of claim statute. As respondents point out, in actions against municipal employees, notices of claim must be served on *both* the municipality and the employees. *Id.* at 5-6. The proposed letter, however, is addressed *only* to the city and thus does not provide proper statutory notice to the respondents, all of whom are City of Milwaukee police officers.

The inability of the respondents to draft an adequate notice illustrates the weakness of their argument concerning the simplicity of the requirement that they claim is routinely followed. Regardless of the motivation of its drafters, the Wisconsin notice of claim requirement operates as a trap for plaintiffs and frustrates access to state courts. Thus, prospective plaintiffs who fail to file statutory notices within 120 days of an incident will rarely risk filing § 1983 claims in state court if they have an available federal forum.[15]

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[15]Respondents also assert that the notice of claim requirement encourages settlements, but cases are no more likely to settle early in the claims process than in the early stages of litigation. More important, there is nothing in the record to demonstrate that the goal of settling cases is met in § 1983 cases involving police misconduct. In fact, prior to trial, petitioner's counsel alleged and offered to prove

> that it is an absolute sham to talk about filing a claim before going into court in a police brutality case. Your Honor, I don't know that the City has ever, in its history, settled a police brutality claim without . . . the case being filed with the court. I don't know what good it would have done.

Tr. 27 (Feb. 25, 1985).

At trial, Alderman Nabors, whose testimony was not transcribed but was referred to in the hearing before Judge Landry, *see* Tr. 167 (Mar. 8, 1985), testified that cases (involving police

(Continued on following page)

C. Any Public Purposes Served By Notice Of Claim Requirements Are Outweighed By The Federal Interest In Preserving § 1983 Plaintiffs' Access To State Courts.

In defending the application of notice of claim requirements to state court § 1983 actions, respondents identify a number of public purposes served by these requirements. The City Management amici further discuss these concerns and argue that it is inappropriate for federal law to interfere with the procedures followed by the state judiciary. These concerns, however, are outweighed by the strong interest in respecting the congressionally established system of concurrent jurisdiction over § 1983 claims.[16]

(Continued from previous page)

misconduct) do not settle during the claims process, and that he could not recall a case that settled without the filing of a civil action. Given the trial court's conclusion that the notice of claim requirement did not apply to § 1983 actions, it made no findings on this issue.

In his Brief to the Wisconsin Supreme Court, petitioner made the following representation: "Police brutality cases, without fault[ing] . . . anyone, traditionally do not settle. The rare settlements occur on the eve of trial or . . . *after* litigation is commenced. Settlements in police force cases of this type do not occur through a common council claim process." Reponse Brief of Plaintiff-Appellant at 32 n.28 (Nov. 5, 1986).

Petitioner then suggested that if the Wisconsin Supreme Court had "any doubt about these factual assertions" concerning the practice of the City of Milwaukee in settling police cases, the court should remand the case to give the plaintiff "an opportunity on remand to prove these matters before the trial court." *Id.* The Wisconsin Supreme Court did not accept petitioner's suggestion but ordered the dismissal of his § 1983 action.

[16]In relying on the traditional justifications for notice of claim requirements, respondents fail to come to grips with their apparent concession that notice of claim requirements are inapplicable in federal court § 1983 litigation. Brief for Respondent at 24. The purposes advanced for these requirements, however, stand little chance of being achieved if they apply only in state courts, but Congress is the only appropriate body to adopt a notice of claim requirement for all § 1983 litigation. *Cf. Patsy v. Board of Regents of the State of Fla.*, 457 U.S. 496, 513-15 (1982).

The state interest in applying notice of claim requirements to § 1983 actions is seriously exaggerated by the City Management amici who identify notice of claim statutes from 37 states and the District of Columbia to demonstrate that such provisions are a "near universal response" to litigation against governmental entities. City Management Amici Brief at 26 & 1a-2a. Despite the widespread use of notice of claim requirements in traditional tort litigation, states have shown little interest in applying these requirements to § 1983 claims.[17] Most of the statutes cited use general phrases to define their coverage (i.e., "all claims," "damages," "negligence," "personal injury," or "tort"), and it is unclear whether they apply to § 1983 claims. Only one of the statutes cited is expressly applicable to federal claims[18] despite the fact that these provisions "have been the focus of much recent legislative scrutiny." City Management Amici Brief at 3a. Thus, it appears that state legislatures have exhibited virtually no interest in applying notice of claim requirements to § 1983 or other federal claims.

One of the strengths of our system of judicial federalism is the double source of protection provided for fundamental rights. Most litigation in this country takes place in the state courts, and the state judiciary is no stranger to federal law. Indeed, state courts entertain

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[17]For example, five of the cited notice of claim statutes apply only to traditional areas of municipal liability such as the maintenance of highways and bridges. *See* Ky. Rev. Stat. Ann. § 411.110 (Baldwin 1979); Mich. Comp. Laws Ann. § 691.1404 (West 1987); Mo. Ann. Stat. § 77.600 (Vernon 1987); R.I. Gen. Laws § 45-15-9 (1980 & Supp. 1987); Vt. Stat. Ann. tit. 19, § 1373 (1968). In addition, Tennessee has repealed its notice of claim requirement, *see* Tenn. Code Ann. § 29-20-301 (1980), *repealed by*, 1987 Tenn. Pub. Acts, ch. 405, § 7; the North Carolina statute cited is only applicable to claims against state agencies made to the Industrial Commission, *see* N.C. Gen. Stat. § 143-291 (1983); and Arkansas completely immunizes political subdivisions from "liability for damages" but authorizes a claims process for settling claims. *See* Ark. Stat. Ann. §§ 21-9-301 & 21-9-302 (1987).

[18]*See* Colo. Rev. Stat. §§ 24-10-109 & 24-10-119 (Supp. 1987).

many federal claims and play an important role in enforcing federal law under the system of concurrent jurisdiction established during our first century. See *Claflin v. Houseman*, 93 U.S. 130 (1876); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820).[19]

State courts have concurrent jurisdiction over § 1983 actions, and the increase in state court § 1983 litigation should be encouraged. That development, however, will be arrested if state courts can interpose state policies that deviate from the federal definition of § 1983 or that burden the litigation of § 1983 claims.[20] State courts may apply state policies in litigation involving state law, *see Martinez v. California*, 444 U.S. 277, 280-83 (1980) (upholding application of state immunity to state claim), but when federal causes of action are heard in state courts, that freedom is appropriately limited.

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[19]Congress recognizes the importance of concurrent jurisdiction in another way. When plaintiffs file § 1983 actions in state courts, defendants may sometimes believe that state policies are inconsistent with § 1983 or its purposes. In such cases, they may argue for the application of federal rules or, if they believe the state courts will not be receptive to their arguments, may avail themselves of the congressionally-authorized procedure for vetoing the plaintiffs' choice of the state courts and remove the action to federal court under 28 U.S.C. § 1441 (a), the general federal removal statute. Defendants should not, however, be able to undercut plaintiffs' choice of the state courts by expecting state courts to refuse to apply essential attributes of the federal cause of action.

The ability of state court § 1983 defendants to remove cases to federal court is a protection that is not made available to defendants in state court FELA cases. *See* 28 U.S.C. § 1445(a).

[20]The decision below, if permitted to stand, will give states a clear signal that they may impose notice of claim requirements in § 1983 litigation. That message would undoubtedly reach not only those states that purport to have flexible notice of claim requirements but also those states that strictly apply notice of claim requirements, especially their time limits. Thus, this Court could be forced to examine whether notice of claim statutes with different features are consistent with federal law. *Cf. Patsy v. Board of Regents of the State of Fla.*, 457 U.S. 496, 513-15 (1982) (burden of developing acceptable exhaustion requirements supports deferring to Congress).

D. State Courts Have Had Jurisdiction Over § 1983 Actions Since 1871.

The City Management amici contend that state courts did not obtain jurisdiction over § 1983 cases until the adoption of the Judicial Code of 1911. City Management Amici Brief at 15 & n.15. That suggestion, even if accurate, does not help respondents because state courts entertaining § 1983 actions would still be under the same obligation to refrain from applying state policies that are either inconsistent with the definition of the § 1983 cause of action or that burden the litigation of § 1983 claims. In any event, as demonstrated below, state courts have had jurisdiction over § 1983 actions since 1871.

Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, not only created a federal remedy but also authorized federal courts to entertain the new civil action. Nonetheless, the language of § 1 demonstrates that Congress did not intend to make federal court jurisdiction exclusive. Section 1983 was patterned after the criminal sanction in § 2 of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 162 (1970), over which federal court jurisdiction was explicitly made exclusive. *See* Civil Rights Act of 1866, *supra*, § 3. Thus, Congress knew how to create exclusive federal jurisdiction but did not do so in § 1. Rather, it simply provided for "such proceedings to be prosecuted in the several district or circuit courts of the United States," saying nothing about the issue of exclusivity.[21]

Moreover, in the 1874 codification of the United States statutes, Congress separated the remedial and jurisdictional provisions of § 1 of the Civil Rights Act of 1871 and placed different formulations of the latter in two separate

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[21]The presumption of concurrent jurisdiction has its roots in the Judiciary Act of 1789 and the approach adopted by the First Congress in vesting federal courts with jurisdiction. *See Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 26 (1820) (relying on Federalist No. 82 and the Judiciary Act of 1789 to conclude that in the opinion of Congress "it was not sufficient to vest an exclusive jurisdiction . . . merely by a grant of jurisdiction generally").

provisions applicable to the district and circuit courts respectively. *See* Rev. Stat. §§ 563 & 629. *See also Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608-09 (1979). Neither of these provisions, however, made federal court jurisdiction exclusive.[22] *See also* Rev. Stat. § 711 (enumerating areas of exclusive federal court jurisdiction).

The Civil Rights Act of 1871 contained jurisdictional provisions because of the absence of a general federal question jurisdictional provision until 1875. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. The 1875 Act, however, further supported the regime of concurrent jurisdiction by providing that "[T]he circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits [meeting the jurisdictional amount] and arising under [federal law]." *Id. See also Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1, 56 (1912); *Robb v. Connolly*, 111 U.S. 624, 637 (1884). Finally, in 1876, in *Claflin v. Houseman*, 93 U.S. 130 (1876), this Court relied on its earlier decision in *Houston v. Moore, supra*, and reinforced the principle of concurrent jurisdiction that has supported state court jurisdiction over § 1983 actions since 1871.[23] *See also Giles v. Teasley*, 193 U.S. 146 (1904) (entertaining a § 1983 case arising from the state courts).

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[22]The 1874 codification also created a subclass of § 1983 claims for which only state courts had jurisdiction. *Cf. Maine v. Thiboutot*, 448 U.S. 1, 8 n.6 (1980).

[23]Although exclusive federal court jurisdiction may exist when the exercise of state court jurisdiction is incompatible with federal interests, *see Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981), there is no such incompatibility between state court § 1983 jurisdiction and federal interests. Moreover, the legislative history of § 1983 does not support the conclusion that Congress intended to preclude state courts either from entertaining the new remedies or from using their pre-existing remedies to address the unlawful conduct Congress sought to curb. *See Patsy v. Board of Regents of the State of Fla.*, 457 U.S. 496, 506-07 (1982).

II. THERE IS NO CLEAR STATEMENT RULE OF STATUTORY CONSTRUCTION THAT REQUIRES CONGRESS TO STATE EXPLICITLY WHICH REMEDIAL ATTRIBUTES OF THE § 1983 CAUSE OF ACTION ARE APPLICABLE IN STATE COURTS.

The City Management amici argue for the adoption of a clear statement rule that would permit the application of state notice of claim requirements to state court § 1983 litigation because Congress has not explicitly prohibited state courts from applying such policies. Such a novel and far-reaching rule of statutory construction, however, is inconsistent with the nature of the § 1983 remedy.[24] Moreover, this Court has never applied a clear statement rule to resolve questions involving either the exercise of state court jurisdiction over federal claims or the remedial policies that apply when state courts entertain federal causes of action.[25]

A. The Use Of A Clear Statement Rule Is Inconsistent With The Nature Of The § 1983 Cause Of Action.

The use of a clear statement rule of statutory construction in the present case would be inconsistent with a number of fundamental features of § 1983.

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[24]In *Mellinger v. Town of West Springfield*, 401 Mass. 188, 196, 515 N.E.2d 584, 589 (1987), the Supreme Judicial Court of Massachusetts adopted a clear statement rule of statutory construction under which it refused to apply the Massachusetts notice of claim requirement absent "a clear legislative statement that § 1983 claimants must comply" with the state requirement.

[25]This Court has used clear statement rules in cases involving the eleventh amendment in which it is unwilling to presume that Congress made states amenable to suit in federal court absent an explicit statement to that effect. *See, e.g., Welch v. State Dep't of Highways and Public Transp.*, 107 S.Ct. 2941, 2947-48 (1987); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Likewise, this Court has used clear statement rules in pre-emption cases, although it has not insisted on clear statements and has found pre-emption based on the scheme of federal regulation. *See California Federal Sav. and Loan Ass'n v. Guerra*, 107 S.Ct. 683, 689 (1987).

Section 1983 is a sparsely worded statute that does not explicitly address many of the more important issues that have arisen in § 1983 litigation. Congress enacted § 1983 because of the inadequacy of existing state remedies, and this Court has broadly construed § 1983 in areas involving fundamental state concerns despite the absence of clear statements by Congress. *See, e.g., Forrester v. White*, 108 S.Ct. 538 (1988); *Pulliam v. Allen*, 466 U.S. 522 (1984); *Monell v Department of Social Servs.*, 436 U.S. 658 (1978); *Smith v. Wade*, 461 U.S. 30 (1983). These decisions apply equally in state and federal courts, and this Court has never imposed a clear statement rule on § 1983 under which state policies would control unless Congress explicitly rejected them.[26]

Moreover, any search in the legislative history for a clear expression of congressional intent on the policies applicable in state court § 1983 litigation is bound to be fruitless. The 42d Congress was primarily concerned with aspects of the proposed Civil Rights Act of 1871 that were more controversial than the civil remedy in § 1, *see Monell*, 436 U.S. at 665, and it is not surprising that there are no detailed discussions of the policies to be applied by state courts entertaining § 1983 actions. Nonetheless, the 42d Congress did not preclude state courts from addressing the evils the legislation was designed to curb, *see Patsy v. Board of Regents of the State of Fla.*, 457 U.S. 496, 505-07 (1982), and it is likely that had members of the 42d Congress expressly addressed these issues they would have expected the new civil remedy to be construed similarly in state and federal courts.[27]

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[26]These constructions of § 1983 are more consistent with Representative Shellabarger's plea for a liberal construction to achieve the Act's remedial purposes, *see Monell*, 436 U.S. at 684 (quoting Rep. Shellabarger), than with a clear statement rule.

[27]This Court has adopted a similar policy with regard to actions filed against federal officials, *see Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and has developed § 1983 and *Bivens* actions similarly. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.30 (1982) (immunity policies). *See also Chin v. Bowen*, 833 F.2d 21, 23 (2d Cir. 1987) (statutes of limitations).

Given the nature of § 1983 as a supplementary federal remedy not dependent on state remedies, a decision permitting state courts to apply their own remedial policies to § 1983 would be anomalous.[28] *See Burnett v. Grattan*, 468 U.S. 42, 55 n.18 (1984). The City Management amici appear to recognize this, and they concede that their proposed clear statement rule should not apply to issues involving damages, remedies, the choice of statutes of limitations, and attorney fees. City Management Amici Brief at 21-22. Petitioner agrees that federal standards should govern these attributes of § 1983 in both state and federal courts and suggests that the proposed clear statement rule is nothing more than an ad hoc rule designed only to produce a desired result in the present case.[29]

B. The Use Of A Clear Statement Rule Is Inconsistent With This Court's Approach To State Court Litigation Of Federal Claims.

The proposed clear statement rule is also inconsistent with this Court's decisions requiring state courts to entertain federal causes of action despite the absence of clear congressional statements obligating state courts to hear

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[28]The case for requiring clear legislative statements by Congress is far stronger when this Court has put Congress on notice as to the rules of statutory construction, *cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374-78 (1982) (implied rights of action), than when this Court is addressing a statute enacted more than a century ago.

[29]The proposed clear statement rule could not be logically confined to state court § 1983 claims and would apply not only to other surviving Reconstruction-era civil rights actions but also to a wide range of modern civil rights and other actions over which state courts have jurisdiction. *See, e.g.*, 29 U.S.C. § 216(b) (Equal Pay Act); 29 U.S.C. § 626(c)(1) (Age Discrimination in Employment Act); 42 U.S.C. § 3612(a) (Title VIII of the Civil Rights Act of 1964). *See also Miller v. Woods*, 148 Cal. App.3d 862, 196 Cal. Rptr. 69 (1983) (§ 504 of the Rehabilitation Act of 1973).

such federal actions. In *Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1 (1912), the Court required state courts to entertain FELA actions. The federal statute expressly provided for state court jurisdiction but did not address whether it was mandatory. In concluding that state courts must take jurisdiction over FELA actions, this Court noted that "[t]he existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication." *Id.* at 58. Connecticut had disagreed with the policies underlying FELA, but this Court dismissed this disagreement as a basis for refusing to hear FELA cases as "inadmissible." *Id.* at 57. Similarly, in *McKnett v. St. Louis & San Francisco Railway*, 292 U.S. 230 (1934), this Court prohibited the Alabama state courts from refusing to entertain FELA actions between nonresidents on out-of-state accidents even though the Alabama courts heard similar transitory actions under state law as well as nontransitory FELA actions.[30] Finally, in *Testa v. Katt*, 330 U.S. 386 (1947), this Court held that state courts could not rely on a policy of refusing to entertain penal statutes of other jurisdictions as a basis for refusing to entertain federal claims. The *Testa* Court pointed to the fact that the Rhode Island courts in question entertained the "same type of claim(s)" under state law, *id.* at 394, but most of the opinion addresses the general duty of state courts to entertain federal claims apart from their obligation to refrain from discriminating against federal claims. In any case, regardless of the breadth of *Testa*, this Court clearly required state courts to entertain a federal cause of action despite the absence of any explicit congressional statement to that effect.[31]

[30]Although Justice Brandeis in *McKnett* characterized the discriminatory treatment of federal claims by the Alabama courts as being inconsistent with the federal Constitution, 292 U.S. at 233, he did not cite any specific constitutional provision and appears to have been referring to the obligation of the state courts under the Supremacy Clause. The principle of nondiscrimination used in *McKnett* and *Mondou*, however, is clearly broader than the specific language of FELA and represents a rule of statutory construction under which state courts are obligated to entertain federal causes of action in the face of congressional silence.

This Court has also regularly reviewed the obligation of state courts entertaining federal causes of action to apply the entire federal cause of action with all its remedial attributes. These cases often raise issues that intimately affect the operation of the state courts, but this Court has resolved these cases without resorting to clear statement rules of statutory construction. For example, this Court has dealt with such sensitive matters as the division of responsibility between the judge and the jury, *see Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359 (1952); the directed verdict standard, *see Wilkerson v. McCarthy*, 336 U.S. 53 (1949); the burden of proof on releases, *see Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); and pleading requirements, *see Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949), and has required state courts to reject their familiar state "procedural" policies.

Much of this Court's jurisprudence considering the policies to be followed by state courts entertaining federal causes of action was developed in FELA litigation, and petitioner has relied heavily on these cases. Although

[31]This Court has treated jurisdictional policies differently from policies that apply when states open their courts to federal actions and has permitted states to apply venue and forum non conveniens policies to exclude subclasses of FELA actions from their courts, *see Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950); *Douglas v. New York, N.H. & H. R.R.*, 279 U.S. 377 (1929), and to regulate which state courts could hear FELA actions. *See Herb v. Pitcairn*, 324 U.S. 117 (1945). In upholding these refusals by state court to exercise jurisdiction over subclasses of FELA actions, this Court relied on the strength of the state interest in the administration of their judicial systems and not simply on the fact that the state policy applied to both state and federal causes of action. In each case there was also an alternative *state* court that could have heard the federal action. The present case, on the other hand, does not involve a refusal to exercise jurisdiction over federal actions, and there is no alternative state court. Moreover, the policy reasons offered in support of notice of claim requirements involve governmental concerns that are unrelated to the actual operation of the state courts or the conduct of litigation.

there are important differences between FELA and § 1983 litigation,[32] the statutes creating these rights of action were both adopted by Congress because of concerns about the adequacy of state remedies. State law provided railroads that were negligent with a broad range of immunity and other defenses, *see* G. Calabresi, *A Common Law for the Age of Statutes*, 32-33 (1982), and Congress created the Federal Employers' Liability Act and authorized actions in both state and federal courts.

Likewise, the Congress that enacted the Civil Rights Act of 1871 was vitally concerned about the adequacy of state remedies and created a supplementary federal remedy for claims involving violations of the Constitution. The City Management amici argue that the Civil Rights Act of 1871 created *only* a supplementary forum, (Brief at 16) but had Congress intended to create only a supplementary forum, it could have done so simply by adopting a statute that provided original or removal jurisdiction. *See* Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (removal jurisdiction). Rather, Congress not only opened the federal courts to these actions but also created a new federal remedy to enforce the fourteenth amendment despite the availability of state common law remedies for redressing the identical conduct. *See Monroe v. Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring).

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[32]FELA was enacted to regulate the private conduct of railroads, while § 1983 was enacted to enforce federal constitutional rights against defendants acting under color of state law. That distinction, however, makes the case for a clear statement rule for FELA cases even stronger than the case for such a rule for § 1983 claims. In FELA, Congress moved into an area of tort law traditionally reserved to the states, *cf. Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), but was able to do so because of the powers granted the federal government under the Commerce Clause. Section 1983, on the other hand, was enacted pursuant to the powers given Congress by the fourteenth amendment. *See Mitchum v. Foster*, 407 U.S. 225, 238 (1972). Given these different sources of legislative authority, the case for a clear statement rule when state courts entertain FELA claims is considerably stronger than when state courts entertain § 1983 claims.

The imposition of a clear statement requirement on Congress before rejecting notice of claim requirements would undercut the increasingly important role of state courts in entertaining § 1983 claims. It would also require the reversal not only of *El Paso & Northeastern Railway v. Gutierrez*, 215 U.S. 87 (1909), which rejected the application of a notice of claim requirement to a state court FELA action,[33] but also of many other cases in which this Court required state courts entertaining federal claims to abandon state policies despite the absence of any clear statements by Congress.[34]

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CONCLUSION

For these reasons, the judgment and opinion of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

CURRY FIRST
BARBARA ZACK QUINDEL
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February 1988

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[33]Respondents claim that *Gutierrez* turns on Congress's plenary power over the territories by asserting that the Court "noted that it would have upheld the application of a claim statute had it been passed by a state as opposed to a territory." Brief for Respondents at 18. This Court made no such statement and this narrow reading of *Gutierrez* is simply wrong. *Gutierrez* was a FELA case that began in the Texas courts, but the Texas courts applied the law of the jurisdiction (including the territory) in which the accident took place. In concluding that federal law would "supersede" the territorial notice of claim requirement, 215 U.S. at 93, this Court neither expressly stated nor implied that it would reach a different result had Texas been applying a Texas notice of claim requirement and not one incorporated into Texas law through the Texas choice of law policy. Rather, this Court refused to allow the Texas courts to require compliance with an otherwise applicable notice of claim requirement in a federally created action despite the absence of any clear congressional statements barring the use of notice of claim requirements.

[34]*See, e.g., supra*, at 23.

Case No. 87-526

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

BOBBY FELDER,

Petitioner,

v.

DUANE CASEY, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

BRIEF OF AMICI CURIAE, THE STATES OF CALIFORNIA, COLORADO, IDAHO, INDIANA, IOWA, MICHIGAN, NEW MEXICO, OKLAHOMA, PENNSYLVANIA, UTAH, VERMONT, VIRGINIA, WEST VIRGINIA, WISCONSIN, WYOMING IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does it violate federal policy for a state to apply its notice of claim statute as a condition precedent to suit in state-court actions brought under 42 U.S.C. § 1983?

TABLE OF CONTENTS

CASES CITED

STATUTES AND RULES CITED

OTHER AUTHORITIES

INTEREST OF THE AMICI CURIAE

The states are interested in the outcome of this case for two principal reasons. First, as sovereign states they have an interest in allocating their judicial resources, and in controlling the conditions under which their courts can be used, to the fullest extent consistent with the Constitution. Second, the majority require a notice as a condition precedent to an action against the states, municipalities, or other political subdivisions, and their officers, agents, and employes. The ubiquity of state reliance on these notice statutes in part led Congress to adopt one for the District of Columbia. See Brown v. United States, 742 F.2d 1498, 1514 (D.C. Cir. 1984) (Bork, J., dissenting), cert. denied, 471 U.S. 1073 (1985).

This case threatens the states' control over the management of their courts. The states support the respondents.

SUMMARY OF ARGUMENT

Federalism requires use of state laws, if not inconsistent with federal policy, including state laws regarding procedures in state courts.

This principle applies to actions under 42 U.S.C. § 1983 (1981). For example, preclusion and abstention principles apply to § 1983 actions out of deference to state rules and state courts. Congress instructed federal courts to borrow from state law in § 1983 actions.

By enacting § 1983 Congress meant to supplement state remedies, not to supplant state court procedures.

A notice rule is not inconsistent with federal § 1983 policies. Those policies are to compensate victims whose federal rights are violated, to deter wrongdoers, and to provide a supplemental federal remedy. Requiring a notice does not itself disturb the substantive rights to be compensated and to enjoin further wrongdoing. And the plaintiff remains free to choose the supplemental federal forum.

The public benefits by the opportunity for early investigation and resolution. The plaintiff benefits by the opportunity for resolution and by a defendant made collectible by the state's indemnity program.

The notice statute applies to any lawsuit. It is neutral as between state and federal interests.

Since the notice requirement comports with procedural due process for purposes of having an adequate post-deprivation remedy, it obviously is not inconsistent with § 1983's policy to remedy procedural due process violations.

ARGUMENT

IT DOES NOT VIOLATE FEDERAL POLICY FOR A STATE TO APPLY ITS NOTICE OF CLAIM STATUTE AS A CONDITION PRECEDENT TO SUIT IN STATE COURT ACTIONS BROUGHT UNDER 42 U.S.C. § 1983.

A. Federalism requires the use of state law if not inconsistent with federal policies.

Federalism requires deference to the state legislatures. State law must be followed, except as otherwise provided by the Constitution or Congress. "[T]he law to be applied in any case is the law of

the state," absent such exception. Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1937).

This principle of federalism is embedded in the tenth amendment. The states retain all attributes of sovereignty, except those the Constitution transfers to the federal government. Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528, 549 (1985). While the Constitution vests in Congress the power to prescribe the basic procedural scheme under which claims may be heard in federal courts, Patsy v. Florida Board of Regents, 457 U.S. 496, 501 (1982), it reserves to the states the power to prescribe the procedural scheme in state courts. To override this state prerogative "is an invasion of the authority of the state and, to that

extent, a denial of its independence." Erie R. Co. v. Tompkins, 304 U.S. at 79.

This principle of federalism controls § 1983 actions. There is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law." Johnson v. Railway Express Agency, 421 U.S. 454, 464 (1975). It does not matter that § 1983 is a uniquely federal remedy: the plaintiff may not continue an action in disregard of state law. Robertson v. Wegmann, 436 U.S. 584, 593 (1978). To illustrate, despite the supplemental nature of a § 1983 action, state court decisions are entitled to collateral estoppel and res judicata effect in federal courts, even where a state court erroneously interprets the Constitution. Allen v. McCurry, 449 U.S. 90, 89-99, 101 (1980). See also Parson

Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 106 S. Ct. 768 (1986) (federal court cannot enjoin state proceeding even if state court misunderstands preclusive effect of federal court decision). Similarly, in abstention law, federalism disfavors interfering with state court judgments because of a state's keen interest in protecting the integrity of its judicial system. Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519 (1987).

Congress did not intend § 1983 to displace state authority over its courts. Congress was adding to the jurisdiction of federal courts; it was not subtracting from state courts' jurisdiction. Allen v. McCurry, 449 U.S. 90, 99 (1980). In fact, Congress had given up trusting the states to protect constitutional rights: § 1983 was intended to supplement, and be

independent of, state remedies, if any. See Wilson v. Garcia, 471 U.S. 261, 279 (1985); Patsy v. Florida Board of Regents, 457 U.S. 496, 503, 505-06 (1982); Monroe v. Pape, 365 U.S. 167, 173 (1961). Section 1983, then, was anything but an attempt by Congress to control the operation of state courts.

In fact, Congress subordinated § 1983 actions to this principle of federalism by enacting 42 U.S.C. § 1988 (1981),[1] whereby Congress "quite clearly

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[1]Section 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as

(Footnote Continued)

instructs [federal courts] to refer to state statutes" when federal law provides no rule of decision for actions brought under § 1983. Robertson v. Wegmann, 436 U.S. 584, 593 (1978). See also Wilson v. Garcia, 471 U.S. 261, 266 (1985) (statute of limitations); Johnson v. Railway Express Agency, 421 U.S. 454, 464 (1975) (statute of limitations); Chardon v. Soto, 462 U.S. 650, 657 (1983) (commencement of limitations period). See generally 28 U.S.C. § 1652 (1966) (Rules of Decision Act).

Petitioner asserts there is no federal "deficiency" for a notice rule to

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> modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts. . . .

fill. Even if petitioner is correct, but see Brown v. United States, 742 F.2d 1498, 1512-14 (D.C. Cir. 1984) (Bork, J., dissenting), a state's interest in managing its court system still must be weighed against any competing federal interest. Petitioner might be correct if the question presented concerned whether federal courts must follow the state's notice rule. But it is an entirely different question, and the only one presented here, whether state courts may follow the state's notice rule. Therefore, it is less significant whether a state notice rule fills a § 1988 "deficiency" than to appreciate § 1988's call to federalism in § 1983 actions. See Eisenberg, State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988, 128 U. Pa. L. Rev. 499, 542 n.142 (January 1980).

State court rules must yield only when "'inconsistent with the Constitution and laws of the United States.'" Robertson v. Wegmann, 436 U.S. 584, 588 (1978). If not inconsistent, state rules are incorporated into federal law. Board of Regents v. Tomanio, 446 U.S. 478, 487 (1980). "A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes a plaintiff to lose the litigation." Robertson v. Wegmann, 436 U.S. at 593.

B. The notice rule is not inconsistent with the federal policies.

The principal policies embodied in § 1983 are deterrence and compensation. Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980). Congress meant to ensure that individuals whose federal rights are violated may recover damages

or secure injunctive relief. See Mitchum v. Foster, 407 U.S. 225, 239 (1972). Congress also intended to provide a remedy that is supplemental and independently enforceable in federal court, whether or not it duplicates a parallel state remedy. Wilson v. Garcia, 471 U.S. 261, 279 (1985), citing Monroe v. Pape, 365 U.S. 167, 173 (1961).

The notice rule is not inconsistent with the policies of compensation and deterrence. Plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by giving notice of their claim. See Cardo v. Lakeland Cent. School Dist., 592 F. Supp. 765, 773 (S.D. N.Y. 1984). Obviously, the notice requirement for state court does not burden the plaintiff's choice of federal court.

There is a public benefit. Notice "afford[s] the municipality an opportunity to compromise the claim and settle it without a costly and expensive lawsuit." Gutter v. Seamandel, 103 Wis. 2d 1, 9, 308 N.W.2d 403 (1981); Patterman v. Whitewater, 32 Wis. 2d 350, 145 N.W.2d 705 (1966). Accord, Indiana Dept. of Public Welfare v. Clark, 478 N.E.2d 699, 702-03 (Ind. Ct. App. 1985), cert. denied 106 S. Ct. 2893 (1986); Mills v. County of Monroe, 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, 458 (N.Y. Ct. App.), cert. denied, 464 U.S. 1018 (1983). See also 423 S. Salina Street v. City of Syracuse, 68 N.Y.2d 474; 510 N.Y.S.2d 507, 503 N.E.2d 63 (N.Y. 1986), appeal dismissed, 107 S. Ct. 1880 (1987) (upholding the notice of claim requirement in a state court action brought under § 1983). Early resolution

of claims benefits both the claimant and the state. These public purposes are not "antithetical to the policy underlying the civil rights laws." Mills v. County of Monroe, 451 N.E.2d at 457.

Giving notice can also advance the objectives of civil rights law. Wisconsin, for example, provides a collectible defendant through the indemnity statute which is the quid pro quo for notice. See sec. 895.46, Wis. Stats; Doe v. Ellis, 103 Wis. 2d 581, 589, 309 N.W.2d 375, 378 (Ct. App. 1981). This Court already has approved as consistent with § 1983 policies the policy to spare the public employe from the worry of personal loss that these indemnity programs serve. See, e.g., Pierson v. Ray, 386 U.S. 547, 555 (1967) (good faith immunity defense saves the police officer, who cannot predict the

future course of constitutional law, from being "mulcted in damages"). See also, Imbler v. Pachtman, 424 U.S. 409, 423-24 (1976) (prosecutors have absolute immunity to assure that their decision-making is unimpaired by the threat of civil suit, despite the broad remedial purposes of § 1983). Finally, the notice rule advances civil rights objectives by enabling the public employer to take prompt remedial action, such as by removing offending employes, repairing procedural flaws, etc.

Moreover, the notice rule meets this Court's concern that a state rule not discriminate against federal claims. See Wilson v. Garcia, 471 U.S. 261, 269 (1985). The statute applies to any cause of action, state or federal. Cf. Figgs v. City of Milwaukee, 121 Wis. 2d 44, 52,

357 N.W.2d 548 (1984) ("any cause of action").

Since the notice statute meets procedural due process standards, it cannot be inconsistent with § 1983, whose purpose is to protect against due process violations. A § 1983 action will not lie for a due process violation, if the state provides meaningful post-deprivation relief. Hudson v. Palmer, 468 U.S. 517, 533 (1984). A state's post-deprivation remedy is adequate even if (a) it provides only for an action against the state as opposed to individuals; (b) it does not allow for punitive damages; and (c) there is no right to a trial by jury. Parratt v. Taylor, 451 U.S. 527, 543-44 (1981). Obviously the notice statute would not make the remedial scheme inadequate. For the state may impose reasonable procedural requirements

so long as the opportunity to sue is meaningful, Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982), and Wisconsin's notice statute meets this standard. See Gumz v. Morrissette, 772 F.2d 1395, 1404 (7th Cir. 1985), cert. denied, 106 S. Ct. 1644 (1986). It would be strange if the notice statute comports with fourteenth amendment due process for Hudson v. Palmer purposes but is inconsistent with § 1983 generally.

C. Petitioner's cases are inapposite.

Notwithstanding the tenth amendment, petitioner avers, Congress can override state procedural rules. Amici concede the point arguendo. In each of the examples petitioner cites, however, this Court located a conflict between state and federal rules. For example, in Garrett v. Moore-McCormack Co., 317 U.S.

239 (1942), state policy on burden of proof had to yield to a contrary federal rule. Similarly, the state rule of pleading struck in Brown v. Western Railway of Alabama, 338 U.S. 294 (1949), encroached on a substantive federal right.

Thus, one can agree with petitioner that a state procedural rule is not ipso facto insulated from the supremacy of a conflicting federal policy, but still prevail on the argument that petitioner has failed to show any conflict here. Surely, there is no inherent inconsistency between the right to sue over a federal claim and the duty to give notice beforehand.

Even petitioner agrees that, generally speaking, state court rules of procedure and evidence apply to federal claims (petitioner's brief at 35-36).

Petitioner then explains away the rule of Minneapolis & St. L. R. Co. v. Bombolis, 241 U.S. 211 (1916), that upheld a state rule permitting non-unanimous jury verdicts, as having turned on congressional intent in that situation (petitioner's brief at 18 n.13). Exactly! Here, there is no evidence of congressional intent to supplant state court notice rules: not a scintilla.

Petitioner's reliance on El Paso & N. E. R. Co. v. Gutierrez, 215 U.S. 87 (1909), turns on itself. This Court held that Congress' exercise of plenary control over the territories superceded a local notice rule. But that case did not involve the prerogatives of sovereign states. Indeed, even as to territories, this Court said a notice statute ordinarily would apply to a federal claim, absent a congressional override.

215 U.S. at 92-93, 96-97. Here, there is no congressional override.

Petitioner also errs in relying on Maine v. Thiboutot, 448 U.S. 1, 11 (1980), wherein this Court held that attorney's fees are equally available in state courts lest claimants face financial disincentives in state courts. Here, however, a § 1983 claimant does not face a financial disincentive, for § 1988 attorney's fees are recoverable and there are no recovery limits. Thompson v. Village of Hales Corners, 115 Wis. 2d 289, 298, 309, 340 N.W.2d 704 (1983). Besides, it is not essential that plaintiff's state remedies be identical to the § 1983 federal remedies. See Parratt v. Taylor, 451 U.S. 527, 544 (1981).

Petitioner also misreads Maine v. Thiboutot as to federalism, suggesting

that since there is no notice rule in federal courts there can be none in state courts lest plaintiffs opt for federal courts. Maine v. Thiboutot, however, was concerned only to avoid a rule that would chase plaintiffs away from state courts. Hence, § 1988 attorney's fees had to be regarded as integral to any § 1983 suit. But that concern for federalism does not warrant the leap that either Congress or this Court meant to invalidate state court notice rules. In fact, it turns federalism on its head to strike state court rules in state court actions. If they are to be struck, the source is the Constitution or an act of Congress, not the doctrine of federalism.

Petitioner contends that the notice statute is but a form of sovereign immunity, thereby inconsistent with § 1983 policies. To the contrary. Even

if the notice statute is a form of immunity, nothing in § 1983 was intended to overcome a sovereign's immunity as enshrined in the eleventh amendment. Quern v. Jordan, 440 U.S. 332, 345 (1979). Moreover, a notice rule is no more a form of immunity than is a statute of limitations: if complied with the plaintiff may proceed against the defendant; if not complied with the plaintiff may not proceed whether or not the defendant otherwise is immune.

Nothing in Wilson v. Garcia, 471 U.S. 261 (1985), invalidates Wisconsin's rule of decision. The Court adopted personal injury statutes of limitations for § 1983 actions, abjuring statutes for actions against public officials. In doing so, however, the Court focused on the intent of Congress and the nature of a § 1983 action in picking the closest

state analogue; the Court was not ascribing to Congress the intent to upset federalism's deferral to the states in choosing procedures for their courts.

Lastly, the petitioner's reliance on Patsy v. Florida Board of Regents, 457 U.S. 496 (1982), is inapposite. Immediate access to courts is no more imperilled by a notice rule than by a filing fee.

CONCLUSION

It is respectfully submitted that the judgment should be affirmed.

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NO. 87-526
IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

BOBBY FELDER,

Petitioner,

v.

DUANE CASEY, et al.

Respondents.

ON WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

BRIEF OF AMICUS CURIAE STATE OF SOUTH DAKOTA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER REFERENCES:

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INTEREST OF THE AMICUS CURIAE

South Dakota is keenly interested in the outcome of this case for two separate reasons. First, South Dakota has a interest in managing its judicial system for the benefit of all its citizens. Within our federal framework, it is imperative that a state's ability to manage its governmental affairs on behalf of its citizens remain intact.

Second, South Dakota has an interest in maintaining the validity of its notice of claims statutes. Those statutes allow claimants ample time in which to give notice of potential claims against a governmental entity, to that entity, while allowing it a reasonable opportunity to investigate the claims and prepare proper responses.

On the basis of these responsibilities to its citizens and itself, South Dakota submits the following argument in support of Respondents and also joins in the arguments of the Amici Curiae Brief filed by the Attorney General of Wisconsin.

SUMMARY OF ARGUMENT

Our federal system recognizes the concurrent jurisdiction of federal and state courts. It further recognizes a citizen's right to pursue a federally-created claim in state court. That system, however, also recognizes a state's right to manage its own

judicial system. Throughout our nation's and this Court's history, a course of action has developed that balances the federal government's strong policy interest in securing federal rights to citizens against the equally important rights of states to limit actions pursued within their respective courts, including limitations on federally-based claims.

Most of the case law reviewing state limitations on federal claims in state courts has grown from the Federal Employers' Liability Act (FELA). The original federal statutes assumed concurrent jurisdiction for cases arising under the Act. The 1910 amendments further strengthened that assumption. (Those amendments also provided that then state-controlled removal procedures remained intact for non-FELA cases.)

A continuing procession of FELA cases contained this Court's determinations

regarding when and how a state could restrict the pursuit of FELA claims within its court system. Two basic restrictions placed on state control of jurisdiction mandate that limitation statutes not discriminate against individuals and that they not apply exclusively to federal claims or other federally-based actions. On the other hand, state courts may utilize the doctrine of forum non conveniens and other procedural rules based on valid, reasonable state policy. Thus, a balancing test between strong federal policy and valid state interest has come about.

More recently, this balancing test has been applied in cases arising under federal civil rights statutes. (42 U.S.C. §§ 1981, 1983, and 1988.) While most of these issues involve application of state law within the federal court system rather than in state

courts, the same balancing test has been utilized.

In the instant matter, there is no question that the federal government has a strong policy interest in protecting its citizens' civil rights. Nonetheless, states have a strong counterbalancing interest in remaining able to impartially utilize reasonable limitation statutes within their respective jurisdictions. Notice of claim statutes are representative of such strong state procedural and jurisdictional interests, thus making this case both representative of and critical to the issue. Here, Wisconsin's notice of claim statute has not been applied in a discriminatory manner. Further, the statute has placed no onerous duty on the Petitioner. The Petitioner was not unduly restricted in presentation of his claim, nor is he barred from pursuing that claim in federal court. Application of the balancing

test must weigh in favor of states' interest in pursuing jurisdictional rules, as represented in state notice of claims statutes.

ARGUMENT

IT DOES NOT VIOLATE FEDERAL POLICY FOR A STATE TO APPLY ITS NOTICE OF CLAIMS STATUTE AS A CONDITION PRECEDENT TO STATE COURT SUITS BROUGHT UNDER 42 U.S.C. § 1983.

An individual's right to assert a claim arising under federal law within a state's judicial system has been debated since the inception of our nation's federal system. Freedom of state courts to enforce federally-created rights was first articulated by Alexander Hamilton in The Federalist No. 82. States' rights advocates initially argued in favor of applying federal law in state courts as a means to retard feared federal

assumption of power.[1] The debate played an important role in the Act of September 24, 1789, ch. 20, § 9, 1 Stat. 77, which granted concurrent jurisdiction to federal and state courts.

The earliest definitive statement by this Court concerning concurrent jurisdiction came in Claflin v. Houseman, 93 U.S. 130 (1876). Giving credence to Hamilton's "usual analytical power and far-seeing genius," this Court said:

> So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States Courts, or in the State Courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the

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[1] By the early 1800's, those same advocates had reversed their position, now fearing that state court systems would be overwhelmed by federal judicial matters.

Federal Courts exclusive jurisdiction.

Id. at 136-137. State courts, when granted jurisdiction under the laws of their respective states and when able to entertain a similar state claim, could hear federal rights cases, unless otherwise specifically dictated by Congress. There existed no assumed jurisdiction for federal rights cases in state courts; presumably, a state could restrict its courts' jurisdiction to hear those cases.

The lion's share of the historic body of law examining a state's ability to restrict federal claims jurisdiction involves the Federal Employers' Liability Act (FELA), 35 Stat. 65 (1908), as amended, 45 U.S.C.A. § 51, et seq. Charles Alan Wright, Law of Federal Courts, § 45 (3d Ed. 1976). The relevancy of the case law surrounding FELA cases has been questioned, however.

> [I]t should be borne in mind that the growth of the law in this area has been almost exclusively confined to state enforcement of the Federal Employers' Liability Act. This makes it difficult to generalize from the decisions, since they probably reflect the peculiar necessities of the statute.

Note, State Enforcement of Federally Created Rights, 73 Harv. L. Rev. 1551 (1959-60). Nonetheless, examination of FELA actions is necessary to provide insight into this issue.

The base FELA case(s) on issue is the Second Employers' Liability Cases, (otherwise known as Mondou v. New York, N.H. & H.R. Co.), 223 U.S. 1 (1912). In its dicta, this Court noted that concurrent jurisdiction had been codified in the General Jurisdictional Act, 25 Stat. at L. 433, ch. 866, § 1, U.S. Comp. Stat. 1901, P. 508. The Court further noted that an amendment to the original FELA legislation stated:

> The jurisdiction of the courts of the United States under this Act

> shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

Second Employers' Liability Cases, 223 U.S. at 56, citing and placing emphasis in the Act of April 5, 1910, 36 Stat. 291, ch. 143. Though it might already have been assumed by interested parties that FELA cases could be brought in state courts, this Court noted that the amendment added greatly to the basis for that assumption.[2]

Though the Second Employers' Liability Cases implied strongly that a petitioner

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[2] It may further be assumed by the language retarding removal of an action in state court to federal court that a state court's ability to control removal of non-FELA federal claims to federal court under the pre-1948 removal procedure remained alive and well. That interesting aspect of jurisdiction control by state-level authority held fast in non-FELA matters.

might mandate that his FELA rights case be heard in state court, language toward the end of the opinion appeared to recognize the possibility of state restrictions.

> We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion.

Second Employers' Liability Cases, 223 U.S. at 59. Clearly, local authorities could still restrain state court jurisdiction in federal matters.

The FELA claim case of Douglas v. New York, N.H.& H.R. Co., 279 U.S. 377 (1929), carried forward the arguments and points of the Second Employers' Liability Cases. The issue there arose under the Privileges and Immunities Clause of the United States Constitution. U.S. Const. art. IV, § 2. The plaintiff, a resident of Connecticut, sued the Connecticut corporate defendant in state

court in New York where the defendant was doing business. The New York courts declined the action. Ruling that the courts of New York would certainly be trusted and could be expected to abide by constitutional considerations, this Court went on to say, "A distinction of privileges according to residence may be based upon rational considerations and has been upheld by this Court . . . ." Douglas, 279 U.S. at 387.

In the Court's final statement, referencing the Second Employers' Liability Cases, Mr. Justice Holmes stated, "But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse." Douglas, 279 U.S. at 388. That statement complies with the previous case's reference to state jurisdiction that arises under local law and adequately meets the litigants' needs. Though no definition was given for an

"otherwise valid excuse," it is clear that a state court might decline jurisdiction in an FELA case on the basis of some rational reason.

One example of an "otherwise valid excuse," as well as another Privileges and Immunities Clause (U.S. Const. art. IV, § 2) question, appeared in Missouri ex rel. Southern Ry. v. Mayfield, 340 U.S. 1 (1950). The issue there was the state's ability to accept or reject the doctrine of forum non conveniens in FELA actions. This Court stated:

> But if a State chooses to '(prefer) residents in access to often overcrowded Courts' and to deny such access to all nonresidents, whether its own citizens or those of other States, it is a choice within its own control. This is true also of actions for personal injuries under the Employers' Liability Act. (Citations omitted to Douglas, supra.) Whether a State makes such a choice is, like its acceptance or rejection of the doctrine of forum non conveniens, a

> question of State law not open to review here.

Mayfield, 340 U.S. at 4. Thus, another state jurisdictional restriction is available, so long as that restriction is applied fairly.

Referring to two prior decisions, the court continued:

> But neither of these cases limited the power of a State to deny access to its courts to persons seeking recovery under the Federal Employers' Liability Act if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially, (citation to McKnett, below), so as not to involve a discrimination against Employers' Liability Act suits and not to offend against the Privileges-and-Immunities Clause of the Constitution.

Mayfield, 340 U.S. at 4. Matters of "local policy" may thus restrict state jurisdiction, again assuming impartial application.

The above-mentioned case of McKnett v. St. Louis and S.F. Ry. Co., 292 U.S. 230 (1934), held that states could not reject

jurisdiction over FELA claims simply because they arose under federal law.

> While Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employers' Liability Act, (citation to Douglas, supra), the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal law. . . . A state may not discriminate against rights arising under federal laws.

Id. at 233-234. A state's refusal to hear an FELA claim on the basis of its federal origin was removed from the list of valid excuses.

Minneapolis and St. L. R. Co. v. Bombolis, 241 U.S. 211 (1916) is worth noting here. That matter hinged on the state's ability to apply jury rules contrary to federal requirements under the Seventh Amendment to the United States Constitution. U.S. Const. amend. VII. This Court held that mandatory application of federal

constitutional standards to state juries would be:

> [I]n conflict with an essential principle upon which our dual constitutional system of government rests; that is, that lawful rights of the citizen, whether arising from a legitimate exercise of state or national power, unless excepted by express constitutional limitation or by valid legislation to that effect, are concurrently subject to be enforced in the courts of the state or nation when such rights come within the general scope of the jurisdiction conferred upon such courts by the authority, state or nation, creating them.

Bombolis, 241 U.S. at 221.

The foregoing cases are illustrative of a growing "balancing test" between citizens' rights to pursue federal claims in state courts and the states' inherent interests and authority under the federal system to control access (jurisdiction) to those courts. It may be best stated as follows:

> It would seem, therefore, more realistic to view the problem as one of accommodation between the somewhat conflicting constitutional

> purposes of securing the effective enforcement of federally created rights in the manner which to Congress seems proper and, at the same time, maintaining the states as viable political units with the ability to direct the ends for which their judicial systems shall be used.

Note, State Enforcement of Federally Created Rights, 73 Harv. L. Rev. 1551, 1555 (1959-60).

This balancing has, in recent history, appeared in application of state law in the federal courts via Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

Addressing a judge and jury conflict of laws question, this Court held in Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525 (1958), a federal court case, that, "A State may, of course, distribute the functions of its judicial machinery as it sees fit." Id. at 536. In its dicta, this Court said that the probability that the outcome of the action might be affected by

"disregarding" the state procedure did not weigh, in balance, so heavily as to have the state rule override federal practice. This Court's holding was based primarily on South Carolina's minimal policy and management interests in the questioned rule; the state "requirement appears to be merely a form and mode of forcing the immunity, (citations omitted), and not a rule intended to be bound up with the definition of the rights and obligations of the parties." Id. at 536. Thus, federal interests may override state rules when those state rules do not express important state policies.

Two more relatively recent FELA cases involving jury rules and standards appeared, on the surface, to run contrary to Bombolis, supra, but both were predicated on a finding that a federal rights petitioner has exceptionally strong interests under federal jury policy. Dice v. Akron Co. & Y. R. Co., 342

U.S. 359 (1952); Wilkerson v. McCarthy, 336 U.S. 53 (1949). In Dice, this Court found a jury trial to be "part and parcel" of a petitioner's rights in an FELA action. Again, strong federal policy can outweigh, in the balance, a state's otherwise applicable procedural system and laws.

The case at bar involves one of several federal civil rights statutes. (42 U.S.C. §§ 1981, 1983 and 1988.) More often than not, the issue of the balance between a petitioner's federal rights and application of state law, particularly procedural law, has arisen in cases in federal court.

The nucleus of federal civil rights policy was stated in Monroe v. Pape, 365 U.S. 167 (1961), overruled on other grounds, 436 U.S. 658, 701 (1978).

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect,

> intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Monroe, 365 U.S. at 180.

Application of the balancing test between a state procedural statute analogous to the Wisconsin statute at issue and the strong federal policy interest in a citizen's civil rights appeared in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). There, a state statute of limitations was at issue.

> Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.

Id. at 463-464. That "point" becomes the fulcrum of the balancing test. This Court

further noted, "Nor is there anything peculiar to a federal civil rights action that would justify special reluctance in applying state law." Id. at 464. This Court identified the balancing test, saying, ". . . considerations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration." Id. at 465. Ultimately, however, the Court found no policy reason that would excuse the plaintiff's failure to abide by the state statute of limitations. Id. at 466.

State law abatement of a federal civil rights case in federal court was the issue in Robertson v. Wegmann, 436 U.S. 584 (1978). Noting the balancing test, as expressed in Johnson, supra, the Court stated that, "Of particular importance is whether application of state law 'would be inconsistent with the federal policy underlying the cause of action

under consideration.'" Robertson, 436 U.S. at 590.

> Despite the broad sweep of § 1983, we can find nothing in the statute or its underlying policies to indicate that a state law causing abatement of a particular action should invariably be ignored in favor of a rule of absolute survivorship.

Id. at 590. Further:

> That a federal remedy should be available, however, does not mean that a § 1983 plaintiff (or his representative) must be allowed to continue an action in disregard of the state law to which § 1988 refers us. A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation.

Id. at 593. State procedural laws restricting federal rights claims are not necessarily overcome, even by strong federal policy.

Prior cases before this Court consistently hold that state time limitation on federal rights claims, within whichever jurisdiction, is acceptable. For example,

the New York statute of limitations tolling rule was not "inconsistent" with federal § 1983 policy because:

> [P]laintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years.

Board of Regents in University of State of New York v. Tomanio, 446 U.S. 478, 479 (1980). And this Court found "no need for nationwide uniformity." Id. at 479. Later, this Court characterized Tomanio, id.--citing Robertson, supra, Johnson, supra, and Monroe, supra--as holding that no federal § 1983 policy--be it deterrence, compensation, uniformity or federalism--is offended by a state's statute of limitations or by its rules governing tolling. Chardon v. Fumero Soto, 462 U.S. 650 (1983). The validity of applying the proper state statute of limitations to a federal civil rights action was

cemented in Wilson v. Garcia, 471 U.S. 261 (1985).

Petitioner may maintain that such approved state statutes of limitations are not analogous to the Wisconsin notice of claim time limitation on the basis that the statute does not fill a federal "deficiency." The true issue, however, is application of the balancing test between Petitioner's federal rights and the State's interest in managing its judicial system.

A notice of claim statute is both procedural and jurisdictional in nature. There is no question that a state has a strong interest in application of such statutes. This strong state interest is adequately expressed in the State of Wisconsin's amici curiae brief, so it will not further be discussed here.

On the other side of the balancing test, Wisconsin has not discriminated against

Petitioner's federal action; its courts applied its notice rule in the same manner to Petitioner's claims arising under state law. Further, there is no showing that Wisconsin has applied its rule in a discriminatory manner to Petitioner. All Petitioner had to do was to comply with the same notice statute as required of any other citizen bringing any tort claim against any governmental unit in the State of Wisconsin.

As Justice Frankfurter pointed out in his concurring opinion in Brown v. Gerdes, 321 U.S. 178, 190 (1944), where Congress provides for enforcement of federal rights in state courts, it must accept conditions for litigation in those courts as it finds them. The State of South Dakota and other states have legitimately required notice of claims as jurisdictional prerequisites to tort actions against governmental units and employees. This procedural and jurisdictional

policy is non-discriminatory and should not be overturned.

CONCLUSION

It is respectfully requested that the judgment be affirmed.

Respectfully submitted,

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No. 87-526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BOBBY FELDER,

Petitioner,

v.

DUANE CASEY, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a state court may apply a general statutory provision, which requires that a plaintiff give notice of a claim against a local government before commencing suit, to bar the assertion of a Section 1983 claim by a plaintiff who failed to comply with that requirement.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

This case involves a State's attempt to protect itself and its municipalities from avoidable litigation and the difficulties of having to defend litigation without timely notice and opportunity to investigate the underlying claim. Wisconsin's notice-of-claim statute is not complex;

compliance is not difficult; and, in appropriate circumstances, a plaintiff may be excused from meeting its literal terms. In this case, the petitioner chose the State's courts as the forum for his Section 1983 claim, but seeks to pick and choose among the procedures applied in those courts, rejecting those that he does not like.

This Court has never squarely held that state courts are obligated to entertain suits filed under Section 1983. Without exception, the state courts have welcomed the opportunity to vindicate the constitutional rights of plaintiffs through Section 1983 actions; they have willingly opened their doors to such claims. But by their willingness to shoulder their share of the burden of Section 1983 litigation against their own employees, officers, and subdivisions, they should not be held to have abandoned their own forms of procedure, which frequently serve important local interests.

Amici believe that under our federal system, procedural variation among the States, and between federal courts and state courts, serves a useful function, reflecting the retention of state sovereignty under the federal plan. It denigrates the role of the States in the constitutional scheme to suggest that they lack the authority or the competence to develop procedural rules to aid in the resolution of disputes that may reach their courts. In particular, where constitutional rights are at issue, it has been clear from the beginning of the Republic that the Framers intended the state courts to have a primary role in the enforcement of those rights.

The States are entitled to experiment, to create what may seem to others to be idiosyncratic rules and unwise innovations. Those innovations may ultimately prove to serve well the public interest in efficient and fair dispute resolution, including constitutional claims, even if a particular plaintiff may be barred by a procedural default from litigating his claim.

This Court has never suggested that the States are obligated to hear federal claims on terms more favorable to plaintiffs than cases presenting only state claims. The proponent of a federal claim who chooses to pursue his claim in the courts of his State should not be entitled to special procedural privileges not available to other litigants in those courts. Sound policy reasons support Wisconsin's notice-of-claim provision, and there is no reason to excuse petitioner's failure to comply with that requirement, any more than any other procedural default.

Amici submit that the decision of the Wisconsin Supreme Court is correct. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT OF THE CASE

Petitioner commenced this lawsuit in Milwaukee County Circuit Court, naming two Milwaukee police officers as defendants. Two amended complaints were filed, naming as defendants additional police officers, the Chief of Police, and the City of Milwaukee. Petitioner alleged that the defendants acted under color of state law intentionally to deprive him of his rights under 42 U.S.C. §§ 1983 and 1985(2), as well as state tort and conspiracy claims.

Petitioner did not comply with the State's notice-of-claim statute, Wisc. Rev. Stat. § 893.80. That statute provides that no action may be brought or maintained against any governmental entity or officer for acts done in an official capacity unless: (1) "within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by

[1] Pursuant to Rule 36 of the Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

the party, agent or attorney is served" on the government and the officer; and (2) a claim containing a statement of the relief sought is submitted to the appropriate representative of the municipal defendant.[2]

As trial approached, respondents moved for dismissal on the basis of petitioner's failure to comply with the notice-of-claim statute. The trial court granted this motion with respect to the state law claims, but denied the motion with respect to petitioner's Section 1983 claim, finding that the notice-of-claim provision did not apply to federal civil rights claims. Instead, the court dismissed the Section 1983 claim on the alternative ground that it was barred by the statute of limitations.

Petitioner appealed that dismissal to the Wisconsin Court of Appeals; respondents cross-appealed the denial of their motion to dismiss the Section 1983 claim for failure to comply with the notice-of-claim provision. The court of appeals reversed on the statute of limitations issue, relying on *Wilson v. Garcia*, 471 U.S. 261 (1985), and affirmed on the notice-of-claim issue.

Respondents appealed that issue, and the Wisconsin Supreme Court reversed, holding that petitioner's failure to comply with Wisconsin's notice-of-claim provision barred his claim under Section 1983. The court reasoned that Wisconsin's notice-of-claim statute was a reasonable and nondiscriminatory procedural rule that did not intrude upon the substance of a Section 1983 cause of

[2] The court below rested its decision on the first requirement, the notice provision. It did not reach the second requirement. To comply with the second requirement, the claim for relief need not be submitted within any prescribed period of time; it is simply a condition precedent to bringing a lawsuit. Once the claim is filed, the municipality then has 120 days to consider and act on the claim. No suit may be brought until the municipality denies the claim or 120 days have passed, at which point the claim is deemed denied. The plaintiff then has another six months in which to bring suit.

action. The court held that, as a matter of sound state law and policy, the procedural requirements of § 893.80 were intended to apply, and did indeed apply, to constitutional claims under Section 1983. It concluded that

> litigants who choose to press their claims in state court cannot "elect" to ignore state procedural rules. The right to sue in state court is accompanied by the corollary duty to abide by certain rules and procedures. Section 893.80 is an example of just such a procedure.

Appendix to Petition (Pet. App.) A-12.

SUMMARY OF ARGUMENT

The state courts serve a fundamental role in the federal plan envisioned by the Framers, and that role is as important in connection with the resolution of constitutional claims as it is in any other field. Respect for the independence of the state courts has led this Court to reaffirm their authority to develop procedures that in the wisdom of the States may serve the interests of justice.

In Section 1983 litigation, as in other litigation, the state courts are not required to change their procedural rules because they have before them a federal cause of action; they need not follow a particular manner of dispute resolution simply because it is used by the federal courts. The States in our federal system enjoy the freedom to create procedural mechanisms to further dispute resolution as they see fit, at least in the absence of any demonstrated intent to thwart the substantive right that Congress has prescribed.

It would therefore be grave error for the Court, in the absence of a clear congressional mandate to do so, to supplant state procedures that serve legitimate state purposes. No such mandate can be found in connection with

42 U.S.C. § 1983. A careful appreciation for the history of federal civil rights legislation—in particular, Section 1983—reveals that Congress' intent there was to provide private citizens with a federal court remedy for violations of constitutional rights. Before the Reconstruction Era, the state courts had an important role—indeed, the primary role—in the adjudication and vindication of constitutional rights. That role was independent of, and at least equal to, any role played by the federal judicial system. By the Civil Rights Act, Congress sought to establish the federal courts for the first time as primary guarantors of constitutional rights, and to prescribe procedures and a cause of action in the federal courts. It was no part of Congress' plan to reform the manner of adjudicating constitutional claims in the state courts.

In States that elect to assume the burden of hearing Section 1983 claims—rather than simply adjudicating constitutional rights under their inherent remedial authority—the courts must apply the cause of action, along with its essential attributes, as Congress intended it. They cannot reshape the cause of action itself. Wisconsin's notice-of-claim statute does not do that, for it addresses an issue that is no essential part of the legal framework of the cause of action established by Congress under Section 1983.

Nor can a State claim to enforce the whole federal cause of action, but establish arbitrary procedural barriers whose effect is so antithetical to the cause of action as to preclude its actual enforcement. That also is not the case here, for Wisconsin's notice-of-claim statute serves not only important interests of the State, but the remedial purposes of Section 1983.

In short, this case concerns a procedural rule in an area in which the state courts are not compelled to follow the practice of the federal courts. It is precisely

the type of procedural rule that the States are entitled to apply in order to facilitate dispute resolution, reduce the burdens on their courts, and, in the long run, serve the interests of justice.

ARGUMENT

I. IN THE ABSENCE OF CLEAR CONGRESSIONAL DIRECTION TO THE CONTRARY, THE STATES ARE FREE TO DEVELOP THEIR OWN PROCEDURES AND APPLY THEM TO SECTION 1983 CLAIMS.

This case presents a question of this Court's regard for the competence of the States to formulate procedures designed to aid in the resolution of disputes and control litigation in their own courts.[3] The question must be ap-

[3] The case does not present the question whether state courts can refuse to entertain Section 1983 actions. On the contrary, the Wisconsin courts, like those of virtually every State, have willingly entertained Section 1983 claims. *See, e.g., Martinez v. California*, 444 U.S. 277 (1980); *Maine v. Thiboutot*, 448 U.S. 1 (1980). In fact, forty-nine of the fifty States have entertained Section 1983 cases in their courts. Only in Virginia is there no reported state court decision involving Section 1983 claims. Tennessee, at one time, rejected state court jurisdiction over Section 1983, but did so on the erroneous assumption that *Congress* intended that federal court jurisdiction be exclusive. *See Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969), overruled by *Poling v. Goins*, 713 S.W.2d 305 (Tenn. 1985). See generally Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. Miami L. Rev. 381, 385-87 & n.15 (1984) (surveying state court decisions accepting jurisdiction over Section 1983 actions).

Petitioner submits (Brief at 14-15 n.10) that the Court also need not reach the question whether state courts are constitutionally required to entertain Section 1983 actions. *Cf. Testa v. Katt*, 330 U.S. 386 (1947). We agree that the Court need not reach that question to affirm. It is difficult, however, to conceive of a rationale by which this Court could reverse the judgment below—and thereby prohibit the imposition of a nondiscriminatory procedural rule designed to further important and legitimate state policies—without effectively mandating state courts to hear Section 1983 actions.

proached with due regard for the historical relationship between the state and federal judicial systems. Congress and this Court have long shown their fundamental concern for the continued independence of the state judiciaries.[4] Central to this concern has been the recognition that States control the procedure in their own courts and that "state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law." *John v. Paullin*, 231 U.S. 583, 585 (1913).

A. State Procedural Rules, Like Wisconsin's Notice-Of-Claim Statute, Govern The Adjudication Of Federal Claims In State Court, Absent Congressional Direction To The Contrary.

From the time of the first Judiciary Act, the state courts were expected to adjudicate federal rights but were not required to use a federal code of procedure. *See generally Brown v. Gerdes*, 321 U.S. 178, 188-93 (1944) (Frankfurter, J., concurring).[5] "The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev.

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[4] As Justice Frankfurter noted in a similar context:

> This is one of those small cases that carry large issues, for it concerns the essence of our federalism—due regard for the constitutional distribution of power as between the Nation and the States, and more particularly the distribution of judicial power as between this Court and the judiciaries of the States.

Staub v. City of Baxley, 355 U.S. 313, 325-26 (1958) (dissenting opinion).

[5] Any other approach tends to deprive the state courts of their independent existence: "That is to say, whether they should be considered as state or Federal courts would from day to day depend not upon the character and source of authority with which they are endowed by the government creating them, but upon the mere subject matter of the controversy which they were considering." *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 221 (1916).

489, 508 (1954). The rationale for this rule derives from fundamental principles: the ability of a State to establish procedures to govern the conduct of litigation in its own courts lies close to the core of its sovereignty. *See FERC v. Mississippi*, 456 U.S. 742, 774-75 (1982) (Powell, J., concurring and dissenting). And precisely because state control over the procedure to be used in its courts is so central to notions about the proper allocation of power between the state and federal governments, this Court has long been reluctant to read into Congress' substantive enactments an intention to upset the normal procedures that the States have established to govern their judicial systems.

There is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law." *Johnson v. Railway Express Agency*, 421 U.S. 454, 464 (1975).[6] To the extent that state procedural rules serve legitimate purposes, and are applied even-handedly, the States are fully within their rights to apply their uniform rules of procedure to such claims brought in their courts.[7]

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[6] As explained below, state procedural rules may not discriminate against federal claims or be used pretextually to thwart the assertion of a federal right. *See, e.g., Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945). Nor could state procedural rules that lack legitimate purpose be used to block adjudication of a federal right. *Cf. Henry v. Mississippi*, 379 U.S. 443, 447 (1965) (state procedural rules that lack legitimate purpose are no bar to this Court's review).

[7] Indeed, this Court has held that prisoners must comply with state procedural rules with respect to access to the writ of *habeas corpus*, which finds its origins in the Constitution itself and which, by its nature, involves the most fundamental of constitutional rights. In interpreting the federal statutes that govern the exercise of the writ, the Court has declined to find in them a congressional authorization to upset the procedural rules that ordinarily govern the conduct of cases in state criminal trials. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 81-91 (1977); *Stone v. Powell*, 428 U.S. 465, 494-95 & n.37 (1976). It would be anomalous to accord Section

That failure to comply with a state procedural rule may cause a plaintiff to lose his ability to prosecute a federal claim in a given case is, of course, by itself insufficient to overcome this fundamental principle. *See Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). Indeed, whenever a state procedural rule prevents a plaintiff from asserting a federal interest, it may be argued that, in order to effectuate properly Congress' intent, state procedures must "give way" to the federal interest and its underlying policies. In such circumstances, state procedural rules are painted as arbitrary because the constitutional interest asserted appears more urgent than the more abstract and generalized policies that inform procedural rules. Notwithstanding any appearance of unfairness in an individual case, it is incontrovertible that general rules of procedure play a vital role in the efficient resolution of disputes and orderly administration of the courts. Frequently, as in this case, they serve other important state policies as well. (See Part II, *infra.*) Precisely for these reasons, and out of respect for state procedural choices, this Court has held that "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978).

A plaintiff bringing his claim to the forum of his choice must take the procedures of his chosen forum as he finds them. Presumably, a Section 1983 plaintiff decides to file his case in state court because of certain procedural advantages that he perceives in the state court that are not available to him in the federal court. For example, Wisconsin courts, unlike the federal courts, allow the entry of a verdict on a vote of five out of six jurors.[8]

1983 plaintiffs greater rights in this regard than persons accused or convicted of serious crimes who are seeking to vindicate their federal constitutional rights.

[8] See Wisc. Rev. Stat. § 805.09(2).

It would be the rare Section 1983 plaintiff who objected to such a rule merely because it was different from the unanimous verdict rule applied in federal court.

In short, in choosing a state forum over a federal forum, a plaintiff must be willing to take the bad with the good. It is fundamentally anomalous to permit a plaintiff who has chosen a state forum to avoid the procedures applicable to that chosen forum, merely because those procedures defeat an asserted federal interest in the plaintiff's compensation.[9] And absent some clear indication of congressional intention to the contrary, this Court must defer to the States in connection with the administration of their dispute resolution systems. Only where Congress specifically so intends should this Court

[9] The anomaly of allowing plaintiffs to "pick and choose" among procedural rules when state courts hear federal claims was aptly summarized by Judge Taft in *Reed v. Pennsylvania Rd. Co.*, 171 Ohio St. 433, 171 N.E.2d 718 (1961), a case involving the Federal Safety Appliance Act and application of the federal "split scintilla" rule for reviewing jury verdicts:

> This court abandoned the scintilla rule years ago . . . and therefore has considerable difficulty in understanding why it should be required to apply the federal scintilla or split-scintilla rule in Ohio courts in this kind of case. . . . If [the plaintiff] elects to sue in an Ohio court, he probably does so in order to secure certain procedural advantages not available to him in a federal court. For example, he may prevail by securing the concurrence of only nine instead of all twelve jurors. . . . Furthermore, no trial judge can grant more than one new trial against him on the weight of the evidence, and no appellate court can reverse more than one judgment in his favor on the ground that it is against the weight of the evidence. . . . Also, he avoids the risk of any comment by the trial judge upon the evidence or the credibility of witnesses. . . . If the plaintiff can, by suing in an Ohio court, get these and other procedural advantages, why should he not be required to take with them those procedural disadvantages that are a part of the ordinary procedure in the courts of Ohio?

Id. at 720 n.1 (citations omitted).

endeavor to reform the application of state procedural requirements to federal causes of action.

B. Congress, When It Enacted Section 1983, Created A Remedy In The Federal Courts Without Any Intention To Supplant State Procedure And Practice When State Courts Entertain Such Actions.

Section 1983 did not create any new substantive rights. It simply provided jurisdiction and authority over constitutional claims and, with the guidance ultimately embodied in 42 U.S.C. § 1988, some direction to the district courts about adjudicating those claims.[10] In enacting

[10] In connection with federal statutory claims, this Court has occasionally held that Congress did not intend to allow certain state procedural rules to interfere with the enforcement of the right as Congress envisioned it. These cases have been limited, by and large, to situations in which (1) Congress purposefully conferred jurisdiction upon the state courts, (2) the right being enforced was uniquely of statutory creation, and (3) the state procedural rule being nullified was inconsistent with the actual substance of the plan of enforcement defined by Congress.

Thus, the Federal Employers' Liability Act ("FELA") cases that petitioner cites (Brief at 12, 18) are generally consistent with the traditional principle that the States may apply their own procedural rules to federal claims heard in their courts. With respect to FELA, Congress expressly conferred jurisdiction on the state courts in certain cases, and one of the principal features of the statutory scheme itself was its procedural reforms. So, for example, in *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359 (1952), the Court found that an Ohio rule concerning the allocation of factual issues between the judge and jury implicated the substance of the FELA cause of action because the jury trial right was essential to the statutory scheme as Congress envisioned it. Similarly, in *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949), the Court, in exercising its authority to define the substance of the federal right created by FELA, held that the application of an antiquated Georgia rule of construction made it impermissibly difficult for a FELA plaintiff to state a cause of action in state court under that federal statute. By contrast, the Wisconsin notice provision at issue here is a purely procedural rule that has no effect whatsoever on the substantive treatment of Section 1983 cases at trial, or even in

Section 1983, Congress' concern was to provide a remedy to persons threatened with, or who had suffered, the deprivation of constitutional rights, by giving them access to the *federal* courts. *See Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). In fashioning Section 1983, Congress thus did not intend to displace long-established state court remedial schemes for adjudicating violations of constitutional rights, or to impose Section 1983's "uniquely federal remedy" upon the state courts. Rather, what was contemplated was "dual or concurrent forums in the state and federal system" (*Patsy*, 457 U.S. at 506) where the "federal remedy is supplementary to the state remedy." *Id., quoting Monroe v. Pape*, 365 U.S. 167, 183 (1961).

The Congress that enacted Section 1983 knew well that the state courts possessed "concurrent power to enforce the Constitution of the United States within their respective limits." *See Patsy*, 457 U.S. at 507 (*quoting* Rep. Bingham). The States did not need Section 1983 to confer upon their courts the power to enforce the Constitution. The state courts had entertained suits premised upon violations of constitutional rights for decades, possessing full power and duty to give relief required by the Constitution in cases within their jurisdiction. *See, e.g., Robb v. Connally*, 111 U.S. 624, 637 (1884). Courts of equity had the power to enforce constitutional rights through injunctions. And like the federal courts, state courts of general jurisdiction presumably possessed the inherent remedial power to redress proven violations of constitutional rights in damages. *Cf. Bivens v. Six*

court. And Congress had no reason to expect any procedural reforms from the state courts that elected to try such claims.

Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Indeed, the competence and duty of the state courts to decide federal questions were considerations relied upon by those who opposed the provision for a federal judiciary in the original Constitution. *See* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 1, 9-12 (2d ed. 1973).

To be sure, after the Civil War, Congress perceived a failure on the part of certain state courts adequately to enforce the civil rights laws and concluded that constitutional rights were suffering as a result of the exclusive reliance on the state courts for their enforcement.[11] Belief that there were "defects in the factfinding processes of the state courts" was apparently widespread. *See Patsy*, 457 U.S. at 506.[12] But even the reform-minded Congress of the post-Civil War era did not undertake to try to reform state court procedures in the field of constitutional adjudication. It chose instead to empower the federal judiciary to address constitutional claims, primarily through Section 1983.[13]

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[11] *See Mitchum*, 407 U.S. at 241, *quoting* Cong. Globe, 42d Cong., 1st Sess. 653 (1871) (" 'We are driven by existing facts to provide for the several states in the South what they have been unable to fully provide for themselves; *i.e.*, the full and complete administration of justice in the courts. And the courts with reference to which we legislate must be the United States courts.' ").

[12] Citing Cong. Globe, 42d Cong., 1st Sess. 322 (1871) (remarks of Rep. Stoughton); *id.* at 459 (remarks of Rep. Coburn).

[13] 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Section 1983 was enacted as Section 1 of the Civil Rights Act of 1871, 17 Stat. 13. It was modeled on Section 2 of the Civil Rights Act of 1866, 14 Stat. 27, and was enacted for the express purpose of "enforc[ing] the Provisions of the Fourteenth Amendment." 17 Stat. 13. *See Mitchum v. Foster*, 407 U.S. at 238.

The Civil Rights Act of 1866, and its successor statute, the Civil Rights Act of 1871, both granted exclusive jurisdiction to the federal courts.[14] Indeed, Section 1988 itself refers only to the jurisdiction of the federal district courts, further evidence that the 42nd Congress was not concerned with enforcement of Section 1983 in the state courts. In fact, it was not until several decades later, with the enactment of the Judiciary Act of 1911, that the Congress tacitly indicated that state courts *may* entertain Section 1983 actions.[15] *See Maine v. Thiboutot*,

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[14] The 1866 Act provided "that the *district courts of the United States*, within their respective districts, shall have, exclusively of the courts of the several states, cognizance of all crimes and offenses committed against the provisions of this act . . . ." Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (emphasis added). The Civil Rights Act of 1871 provided

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; *such proceeding to be prosecuted in the several district courts or circuit courts of the United States* . . . ."

Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (emphasis added).

[15] In contrast to the jurisdictional provisions of the Civil Rights Act of 1871, which gave the federal courts exclusive jurisdiction over Section 1983, the Judiciary Act of 1911 provided that the federal district courts shall have "original jurisdiction" over such

448 U.S. 1, 3 n.1 (1980); *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980).

Section 1983's legislative and statutory history thus make two propositions clear. *First*, the thrust of that statute was to provide a device by which the *federal* courts could grant relief to persons who were deprived of their civil rights. The strategy of the 42nd Congress was not to alter the manner in which the state courts adjudicated constitutional rights; rather, it was to provide a *supplementary* forum. *And second*, the 42nd Congress not only did not intend to interfere with procedural perquisites of the States and their courts, but did not even contemplate that state courts would entertain Section 1983 actions *per se*.

Now that Congress no longer expressly prohibits state court jurisdiction over Section 1983 claims, it seems fair to infer that if Congress directly considered the matter, it would (1) wish to further the federal interest in the adjudication of constitutional rights by allowing Section 1983 claims to be pursued in state courts (as this Court has now held), but (2) would want to do so without impinging upon the historic interests of the States themselves,[16] including their interest in prompt resolution of

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actions. Under settled principles of federal jurisdiction, this language has been interpreted as affording concurrent jurisdiction in state and federal courts. Accordingly, this Court has interpreted the statutory and jurisdictional framework of Section 1983 as *permitting*, although not necessarily *requiring*, state court jurisdiction over Section 1983. *See Martinez v. California*, 444 U.S. 277, 283 n.7 (1980). Clearly, history evidences no purposeful congressional intent that the States hear Section 1983 claims, let alone that they treat them in a procedurally preferential manner.

[16] Petitioner mistakenly relies (Brief at 12, 19) on *El Paso & N.E. Ry. v. Gutierrez*, 215 U.S. 87 (1909), for the proposition that notice-of-claim requirements are a procedural barrier that may not be applied by the *States* to federally created actions. In that case, the Court barred the application of a New Mexico *territorial* notice

disputes and the creation of techniques to aid in the resolution of claims that may reach their courts and affect their citizens. It is fully appropriate to allow state courts to take jurisdiction over Section 1983 disputes; but if Congress' overall plan is to be given effect, it is also necessary to allow the state courts a wide procedural berth in resolving those disputes.

C. The Standards Employed By This Court In Considering Questions Under Section 1988 Are Not Appropriate To This Case.

Petitioner's attempt to import the standards used under Section 1988 to decide the question presented here is unsuccessful. Indeed, the structure of Section 1988 demonstrates why Congress must be viewed as having allowed the States the freedom to establish rules such as the notice-of-claim provision at issue here.[17]

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provision in a court hearing a FELA claim in a neighboring State. The decision was plainly based on Congress' plenary power over the territories. Congress enjoys no similar "plenary" power over the States. The very existence of state sovereignty requires this Court to presume that Congress did not intend to override state procedures unless its intention to do so was manifest.

[17] In creating a federal cause of action under Section 1983 that could be heard in the federal courts, Congress did not prescribe all of the procedural details appurtenant to the statutory right: *e.g.*, the statute of limitations, rules on survivorship, or specific remedies. Instead, in 42 U.S.C. § 1988, Congress provided some guidance to the federal courts about how to "fill in" these procedural and remedial details in the absence of a clear federal rule:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the

Section 1988 was intended to allow the federal courts to "fill the gaps" in the statutory and jurisdictional framework that Congress created with the enactment of the civil rights statutes. Such gap-filling is not unusual in the context of federal statutory rights. Although federal law may establish rights, or (as here) rights of action to ease the vindication of preexisting rights, Congress does not always set forth in its statutory enactments those " 'quasi-procedural' elements that are generally considered necessary to the fair litigation of its causes of action." *See Brown v. United States*, 742 F.2d 1498, 1503 (D.C. Cir. 1984) (en banc). Thus, the federal courts are authorized to embark on the highly judgmental task of "borrowing" rules from some other source when the federal scheme is deficient. Such borrowing is limited to situations in which Congress has not specifically legislated with respect to a feature or characteristic of the customary legal framework that by "logic and tradition" invariably accompanies the existence of the right of action. *Id.* at 1505. The most frequent occasions for borrowing have been in connection with such matters as statutes of limitations, rules on survivorship, and remedies, without which the legal framework would not be complete. *See, e.g., Wilson v. Garcia*, 471 U.S. 261 (1985). In these narrow "quasi-procedural" areas, in which *some* rule is necessary to the proper adjudication of any claim, the federal courts are authorized (and, in the case of Section 1988, explicitly instructed) to engage in the quasi-

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> State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

Section 1988 thus specifically instructs federal district courts hearing Section 1983 claims to apply *state law* to fill in the interstices left by federal law, except insofar as state law is "inconsistent" with Section 1983's policies. *See Board of Regents v. Tomanio*, 446 U.S. 478, 485 (1980).

legislative and highly judgmental enterprise of curing deficiencies.[18]

That is a far different process from the adjudication by a state court of a Section 1983 claim.[19] The state court

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[18] The federal courts' limited lawmaking power is exercised reluctantly and cautiously. The federal courts' creative authority under Section 1988 has been circumscribed by the direction to draw upon existing state law rules to fill deficiencies where possible. Where state law rules do not accomplish that task, the federal courts are authorized, in effect, to select some other rule that will do so.

[19] Petitioner's suggestion (Brief at 31 n.22) that this Court decided in *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), that the "choice of law" provisions of 42 U.S.C. § 1988 apply in state courts is incorrect. In *Sullivan*, the Court held that there is an implied right to damages for violations of 42 U.S.C. § 1982, reasoning that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." 396 U.S. at 239. The Court did not, however, specifically reach the issue of how the state court was to determine damages because the issue of damages had not been litigated below. *Id.* at 240. *See also id.* at 256 & n.33 (Harlan, J., dissenting). Although the Court suggested in dicta that the rule of damages to be applied was governed by "federal standards, as provided by Congress in 42 U.S.C. § 1988" (*id.* at 239), a holding to that effect in some future case could be supported by the rationale that a uniform rule of damages must be applied in state and federal courts because a rule of damages is so central to the Section 1982 claim. The dictum in no way suggests, however, that the state courts should follow the same "choice of law" analysis as do the federal courts. As we show below, that would make little sense given the full array of procedural and remedial rules already in place in the state courts.

Indeed, Section 1988 could not apply by its terms in the state courts. It requires that the federal district courts first look to federal law and procedure—before any "choice of law" question even arises. The state court cannot be required to look first at federal procedure; that would turn state courts into mirrors of the federal courts. They must look first to their own law and procedures. It is only with respect to the definition of the underlying substantive right, and those quasi-procedural aspects of the right that are an essential part of the legal framework associated with that right, that uniformity between federal and state courts

has available a full panoply of procedural rules and statutes that it applies on a daily basis to claims that come before it. In connection with most of the procedural decisions that it will make, its role is not to exercise quasi-legislative discretion, but simply to apply the rules that the state legislature has prescribed. Unlike the federal courts, which must choose rules in applying Section 1988, the question confronting a state court in a situation such as the one presented here is whether the rules that it ordinarily applies must be abandoned.

Section 1988's only relevance to this case is that it emphasizes the fallacy of two arguments. *First*, it demonstrates that uniformity was not a primary concern of Congress in enacting Section 1983. If Congress could tolerate significant variations in even the central "quasi-procedural" rules as between the federal courts in different States—the inevitable result of the instruction to a federal court to draw guidance from the particular State in which it sits—it could certainly tolerate the usual variations, as between state and federal courts, in non-central areas of procedure. *Second*, the instruction to the federal courts to resort to state law in the first instance to fill the deficiencies in the federal scheme shows that even in the post-Civil War era, Congress retained its basic faith in the States and their ability to create rational rules worthy of application to the civil rights laws.

II. WISCONSIN'S NOTICE-OF-CLAIM STATUTE IS NOT ANTITHETICAL TO THE FEDERAL CLAIM, AND SERVES LEGITIMATE PURPOSES CONSISTENT WITH SECTION 1983.

Drawing first on the traditional rule that "federal law takes the state courts as it finds them," and second, upon the knowledge that Section 1983 was not intended to

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is required. Consistency in remedies—like consistency in the choice of statutes of limitations, survivorship rules, or entitlement to attorney's fees—may fall into the category of quasi-procedural rules upon which uniformity is required.

reform state court procedures, *amici* suggest that state court procedures apply to Section 1983 claims unless the state court has failed to apply the "entire cause of action" established by Congress; or the state court procedural rule in question is so antithetical to the purposes of Section 1983 that it effectively destroys the federal claim. Wisconsin's notice-of-claim requirement does not diminish the Section 1983 cause of action, and it serves important state interests that are fully consistent with the purposes of Section 1983.

A. In Applying A Notice-Of-Claim Requirement To Section 1983 Litigation, The Wisconsin Courts Do Not Thereby Fail To Hear The Entire Cause Of Action As Defined By Congress.

It is beyond serious dispute that state courts are not at liberty, under the guise of procedural rulemaking, to reshape the Section 1983 cause of action established by Congress. State courts must hear "the entire federal cause of action" (Pet. Brief at 14), and are not free to accept those aspects of the congressionally created cause of action that they like, and reject those that they do not like. The issue, then, is what are the essential attributes of the cause of action.

Whatever Congress has specifically included in the Section 1983 right is obviously "essential." To deny any part of that would be inconsistent with the federal cause of action. Thus, an entitlement to damages and injunctive relief, as [illegible] the availability of attorney's fees to prevailing Section 1983 plaintiffs, are at the core of the cause of action.[20] Moreover, in light of the procedural

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[20] In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court held that the availability of attorney's fees under Section 1988 applies to Section 1983 actions brought in the state courts. *Id.* at 8-11. That decision, however, turned on the legislative history of the Attorney's Fees Awards Act of 1976, and not Section 1983. *See id.* at 9-11 ("Representative Drinan described the purpose of the Civil Rights Attorney's Fees Awards Act as 'authoriz[ing] the award of a reasonable attorney's fee in actions brought in State or Federal courts.'").

and remedial omissions in Section 1983, and Congress' instruction to the federal courts to fill in the essential legal parameters, Section 1983's cause of action may also include certain of the "quasi-procedural" attributes of the right that are so inextricably bound up with the cause of action as to require uniform application. Thus, for example, a uniform federal rule of decision regarding the type (although not the length) of statute of limitations applicable to Section 1983 actions (*see Wilson v. Garcia*, 471 U.S. 261 (1985)), may well be so much a part of the substance of a Section 1983 right as to mandate its application in state courts.

Here, by contrast, although federal courts do *not* apply notice-of-claim rules to Section 1983 litigation, this feature of federal court 1983 practice is not an essential part of the cause of action itself. Notice statutes are of a different order than the cause of action itself or those quasi-procedural rules that are essential to the legal framework and without which the legal framework is deficient. They are among the vast body of procedural rules, rooted in policies unrelated to the definition of any particular substantive cause of action, that forms no essential part of "the cause of action" as applied to any given plaintiff. The issue of such notice is simply not close to the core of the legal framework that Congress expressly established, and which it instructed the federal courts to elaborate in Section 1988. For this reason, it cannot be said that, in applying a notice requirement to Section 1983 claims asserted in their courts, the States are thereby failing to apply the entire federal cause of action as Congress has defined it.[21]

[21] Section 1983 adjudication is not "deficient" without some notice-of-claim rule. *See Brown v. United States*, 742 F.2d 1498 (D.C. Cir. 1984) (en banc). Thus, the federal courts need not reach out to adopt such a rule. If the Section 1983 cause of action were viewed as deficient without some form of rule on notice-of-claim, *amici* would suggest in that case that the federal courts must borrow the notice-of-claim statute of the State in which they sit. *See id.* at 1512 (Bork, J., dissenting).

Rules that serve legitimate state purposes in dispute resolution are not likely to bar a state court from hearing the entire cause of action as Congress intended it. Such rules serve purposes collateral to the substantive entitlement to vindicate the underlying claim. For example, requiring mediation or non-binding arbitration for all civil damages cases might reduce the burden on the judiciary and lessen the expense to litigants who settle their claims through such offices, and make them better prepared if they elect to go to trial. If a State adopted such programs, and found them successful, it would make little sense to ignore the state procedural policies that underlie such rules, and that confront every other litigant in the State, by excusing Section 1983 plaintiffs from compliance. The mere fact that the rule would add a step to the process of bringing a claim to trial in the state court would not transform the underlying cause of action as Congress intended it to be applied.

In a similar vein, *amici* suggest that exhaustion of administrative remedies may be a requirement that the state courts might apply to Section 1983 actions (provided it was uniformly applied to *all* causes of action litigated in state courts), even while the federal courts operate under a different rule. In holding, in *Patsy*, that exhaustion of administrative remedies cannot be a procedural prerequisite to a Section 1983 suit in federal court, this Court relied on the suggestion in the legislative history, and in Congress' subsequent actions, that "immediate access to [the federal] courts" was near the core of congressional concern. 457 U.S. at 504-05. But whatever Congress' specific intent that might allow the federal courts to ignore state administrative procedures in taking jurisdiction of civil rights claims, it is quite another thing to require the state courts to ignore their own procedural practices, if the States' legislatures have weighed these close questions of policy differently.[22] The Court would

[22] In *Patsy*, several members of this Court noted the various sound policy reasons that might lead one to conclude that exhaus-

have to consider long and hard whether exemption from exhaustion of administrative remedies is so much a part of the legal framework of Section 1983 that it must be carried over into the state courts, or whether the "no exhaustion" rule is more aptly considered simply part of the procedural background of adjudication in the federal court and upon which strict uniformity in the state courts is not required.

Exhaustion of administrative remedies may be the hard case; this case, involving only a notice of claim, is not. Because the substantive scope of Section 1983 is not dependent on the existence or non-existence of certain forms of procedural practice, such as those embodied in notice-of-claim statutes, and because procedural experimentation and reform by the States serves a valuable function, the States should be free to apply such rules to the extent that they rest on otherwise valid procedural policies.

B. Wisconsin's Notice-Of-Claim Provision Is A Nondiscriminatory Procedural Rule That Serves Legitimate And Reasonable State Interests Consistent With The Purposes Of Section 1983.

Procedural requirements must be expressions of legitimate state policy; may not frustrate the vindication of federal claims; and may not discriminate against the federal right *vis-a-vis* analogous state rights. As shown below, notice-of-claim provisions are not antithetical to Section 1983, in either purpose or effect. On the contrary, notice provisions serve the underlying purposes of the statute by, among other things, facilitating settlement and permitting the State the opportunity to remedy ongoing wrongs.

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tion of administrative remedies would be advantageous. *See* 457 U.S. at 516-17 (O'Connor, J., concurring); *id.* at 518 (White, J., concurring).

Wisconsin's notice-of-claim statute, like similar statutes in most other States, is bottomed on sound judgments regarding the special problems that local governments face in dealing with numerous claims.[23] The Wisconsin provision applies to all actions brought against municipal governments in the State, whether under federal or state law, and there is no suggestion that it has not been applied even-handedly and without discrimination against federal causes of action.[24] Compliance with the statute is not difficult: typically, a simple document that recites the facts giving rise to the injury and that indicates an intent on the plaintiff's part to hold the City responsible for any resulting damages will suffice. *See* Pet. App. A14.[25] More important, the purposes for notice-of-claim laws

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[23] Petitioner's attempt (Brief at 27-30) to link notice-of-claim provisions with assertions of state sovereign immunity from federal law is misguided. To the contrary, the statutes are an integral part of the States' expansion of governmental tort liability. Having eliminated immunity, the States became aware that local bodies could be inundated with claims for which procedures to manage, investigate, and process in an orderly and efficient manner did not exist. Notice-of-claim statutes are part of the procedures subsequently adopted to meet these concerns. They are not intended as arbitrary procedural hurdles designed to trap unwary plaintiffs; they legitimately address the special needs of local government bureaucracies in handling claims engendered by the very existence of municipal liability.

[24] Relying on the express language of Section 893.80, the Wisconsin Supreme Court has held that the notice requirement applies to "*any* cause of action." *See Figgs v. City of Milwaukee*, 121 Wis.2d 44, 357 N.W.2d 548 (1984) (emphasis in original), quoted in the decision below. Pet. App. A-9 n.3.

[25] Petitioner overstates the "burden" of complying with Section 893.80. See Brief at 25-27. Wisconsin courts have been lenient in applying § 893.80 and its predecessors, and have repeatedly held that only substantial, rather than strict, compliance is required to satisfy the statute. *See Gutter v. Seamandel*, 103 Wisc.2d 1, 308 N.W.2d 403, 408 (1981), *citing Novak v. Delavan*, 31 Wis.2d 200, 143 N.W.2d 6 (1966).

are not pretextual; such laws are a near universal response of state legislatures to the problems that arise when a government entity is a potential defendant in a lawsuit.[26] A number of interconnecting reasons, defined over several decades, support deference to the States' judgments in enacting these provisions.

First, early notice serves remedial purposes consistent with the public interest embodied in the civil rights statutes. Notice may publicize violations and provide government officials the opportunity to implement curative measures that will avoid successive injuries. Local government agencies are frequently large bureaucracies. Through early notice, a state or local government may timely learn of the existence of a deficiency in its plan of constitutional enforcement, or in the constitutional education of employees, and implement a corrective plan. Thus, the public interest is best served when notice-of-claim requirements force the disclosure of unlawful conditions or practices sooner rather than later.

Second, prompt notice permits local governmental entities an opportunity to investigate the factual circumstances surrounding a claim. By "compel[ling] notice . . . the municipal defendant may investigate early, prepare a stronger case, and perhaps reach an early settlement." *Brown v. United States*, 742 F.2d at 1506.[27] The

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[26] As the Appendix to this brief indicates, the legislatures of the various States have been active in fashioning and re-fashioning notice-of-claim statutes. At least thirty-seven States currently have some type of notice statute or, alternatively, a statute allowing localities to devise their own notice-of-claim requirements. The remaining States have exercised their discretion, either through their legislatures or their courts, to handle these problems differently.

[27] *See also Brown v. United States*, 742 F.2d at 1516 (Bork, J., dissenting); *Antonopoulus v. Telluride*, 187 Colo. 392, 532 P.2d 346, 349 (1975); *Fraser v. Henninger*, 173 Conn. 52, 376 A.2d 406, 409 (1976); *DeKine v. District of Columbia*, 422 A.2d 981, 985 (D.C. 1980); *Rio v. Edward Hospital*, 104 Ill.2d 354, 472 N.E.2d 421, 425

ability to obtain accurate information about an event declines over time. Witnesses' memories fade, and the physical surroundings of an incident may substantially change between the time of an event and its investigation. Investigation is likely to be more effective closer to the time of the incident giving rise to a cause of action.

Effective investigation yields tangible benefits to both claimants and defendants. An accurate factual picture of an incident enables the municipality to assess the extent of its potential liability and the validity of the complaint against it, and make an appropriate response. If the investigation discloses fault, the municipality can provide immediate compensation to the complainant, preferably before any suit is filed. If litigation results, settlement is more likely if factual matters are clear.

Third, notice-of-claim statutes are generally conducive to prompt and amicable settlements, with far less expense to both parties and less burden on the courts (to the benefit of all litigants).[28] Where settlement is not possible,

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(1984); *Dukes v. City of Louisville*, 425 S.W.2d 110, 112 (Ky. 1967); *George v. Town of Saugus*, 394 Mass. 40, 474 N.E.2d 169, 171 (1985), *Kustasz v. Detroit*, 28 Mich. App. 312, 184 N.W.2d 328 (1971), *Quinn v. Graham*, 428 S.W.2d 178, 184 (Mo. App. 1968); *Navarro v. Rodriguez*, 202 N.J. Super. 520, 495 A.2d 476 (1984); *423 So. Salina St. v. City of Syracuse*, 68 N.Y.2d 474, 503 N.E.2d 63, 71 (1986); *Bessette v. Enderlin School Dist. No. 22*, 288 N.W.2d 67, 71 (N.D. 1980); *Reirdon v. Wilburton Bd. of Education*, 611 P.2d 239, 240 (Okla. 1980); *Artco-Bell v. City of Temple*, 616 S.W.2d 190, 192 (Tex. 1981); *Heller v. Virginia Beach*, 213 Va. 683, 194 S.E.2d 696, 698 (1973); *Hansen v. Wightman*, 14 Wash. App. 78, 538 P.2d 1238, 1252 (1975).

[28] *See, e.g., Antonopoulus v. Telluride*, 187 Colo. 392, 532 P.2d 346, 349 (1975); *DeKine v. District of Columbia*, 422 A.2d 981, 985 (D.C. 1980); *Rio v. Edward Hospital*, 104 Ill.2d 354, 472 N.E.2d 421, 425 (1984); *Dukes v. City of Louisville*, 425 S.W.2d 110, 112 (Ky. 1967); *Langevin v. City of Biddleford*, 481 A.2d 495, 497 (Me. 1984); *George v. Town of Saugus*, 394 Mass. 40, 474 N.E.2d 169, 170 (1985); *Navarro v. Rodriguez*, 202 N.J. Super. 520, 495 A.2d 476 (1984); *423 So. Salina St. v. City of Syracuse*, 68 N.Y.2d

notice-of-claim provisions may reduce the burden of litigation by reducing the burden of discovery. These benefits similarly are not restricted to governmental defendants; the costs and delay of formal adjudication fall hard on both plaintiffs and defendants.

Fourth, notice-of-claim provisions are important to accurate and responsible fiscal planning by local governments.[29] The existence of latent claims can wreak havoc on municipal budgets and jeopardize necessary government services. Moreover, fiscal planning requires more than the ability to pay a claim in a particular case. To the extent that the same condition or similar incidents may give rise to further claims, notice of one claim may alert the municipality to an entire class of potential liabilities and expenses.[30]

474, 503 N.E.2d 63, 72 (1986); *Bessette v. Enderlin School Dist. No. 22*, 288 N.W.2d 67, 71 (N.D. 1980); *Reirdon v. Wilburton Bd. of Education*, 611 P.2d 239, 240 (Okla. 1980); *Arteo-Bell v. City of Temple*, 616 S.W.2d 190, 192 (Tex. 1981); *Heller v. Virginia Beach*, 213 Va. 683, 194 S.E.2d 696, 698 (1973).

[29] *See, e.g., Antonopoulus v. Telluride*, 187 Colo. 392, 532 P.2d 346, 349 (1975); *Fraser v. Henninger*, 173 Conn. 52, 376 A.2d 466, 409 (1976); *Rio v. Edward Hospital*, 104 Ill.2d 354, 472 N.E.2d 421, 425 (1984); *Quinn v. Graham*, 428 S.W.2d 178, 184 (Mo. App. 1968); *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W. 2d 339, 343 (1976); *Bessette v. Enderlin School Dist. No. 22*, 288 N.W.2d 67, 71 (N.D. 1980); *Reirdon v. Wilburton Bd. of Education*, 611 P.2d 239, 240 (Okla. 1980); *Arteo-Bell v. City of Temple*, 616 S.W.2d 190, 192 (Tex. 1981); *Hansen v. Wightman*, 14 Wash. App. 78, 538 P.2d 1238, 1252 (1975).

[30] A private defendant may face similar threats to its financial stability, and may indeed be forced out of business, by adverse damage awards. The public interest in stable local governments and the vital services that they provide preclude forcing government entities out of business. Moreover, because the taxpaying public bears the cost of damage awards, the public interest requires that they be reduced or avoided if at all possible. These clear differences between public defendants and private defendants justify their different treatment under notice-of-claim statutes.

Fifth, because the actions which may serve as a predicate for Section 1983 claims are sometimes insured risks, notice-of-claim provisions serve an important function in controlling liability insurance costs. High damage awards against local governments have led to a crisis in the municipal liability insurance industry. The increased cost of municipal insurance has forced many local governments to curtail public services or cancel programs because they cannot afford the insurance premiums necessary to cover those activities. Some local governments have had trouble obtaining insurance under any circumstances. In order to control insurance premiums local governments must take immediate remedial measures that only early notice allows. In addition, early notice of a claim permits municipalities and their insurance carriers to assess coverage questions prior to the inception of litigation. Frequently, prompt coverage determinations help to facilitate the settlement of claims.

In short, the notice-of-claim provision at issue here serves important state purposes and is entirely consistent with the desire for prompt and fair resolution of meritorious constitutional claims. Although it may, on occasion, adversely affect a particular plaintiff, its objectives are fully compatible with the purposes of Section 1983 itself.

CONCLUSION

For the foregoing reasons, the judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

Thirty-seven States and the District of Columbia currently have some form of notice-of-claim provision for claims against state or local government:

Ala. Code §§ 11-47-23, 11-47-192 (1975).

Ariz. Rev. Stat. Ann. § 12-821 (1982 & Supp. 1987).

Ark. Stat. Ann. §§ 12-2901 through 12-2903 (1968 & Supp. 1986).

Cal. Govt. Code § 911.2 (West 1980 & Supp. 1987).

Colo. Rev. Stat. § 24-10-109 (1973 & Supp. 1986).

Conn. Gen. Stat. Ann. § 7-465 (West 1972 & Supp. 1987).

Del. Code Ann. tit. 10, § 4013 (Supp. 1986).

D.C. Code Ann. § 12-309 (1981).

Fla. Stat. Ann. § 768.28 (West 1986).

Ga. Code Ann. § 36-33-5 (1987).

Idaho Code § 6-905 *et seq.* (1979 & Supp. 1987).

Ind. Code § 34-4-16.5-1 *et seq.* (1986).

Ky. Rev. Stat. Ann. § 411.110 (Michie 1970).

Me. Rev. Stat. Ann. tit. 14, § 8107 (1980).

Md. Cts. & Jud. Proc. Code Ann. § 5-306 (1984 & Supp. 1986).

Mass. Gen. Laws ch. 258, § 4 (1958 & Supp. 1987).

Mich. Comp. Laws Ann. § 691.1404 (West 1987).

Minn. Stat. Ann. § 466.05 (West 1986).

Mo. Ann. Stat. § 77.600 (Vernon 1987).

Neb. Rev. Stat. § 23-2401 *et seq.* (1983 & Supp. 1986, 1987).

N.H. Rev. Stat. Ann. § 541-B:16 (1974 & Supp. 1986).

N.J. Rev. Stat. Ann. § 59:8-3 *et seq.* (West 1982).

N.M. Stat. Ann. § 41-4-16 (1978).

N.Y. Gen. Mun. Law § 50-e (McKinney 1986).

N.C. Gen. Stat. § 143-291 *et seq.* (Supp. 1986).

Okla. Stat. Ann. tit. 51, § 156(B) (West 1978 & Supp. 1987).

Or. Rev. Stat. § 30.275 (1984).

R.I. Gen. Laws § 45-15-9 (1980 & Supp. 1986).

S.C. Code Ann. § 15-78-10 *et seq* (Law. Co-op. Supp. 1986).

S.D. Codified Laws Ann. § 3-21-1 *et seq.* (1985 & Supp. 1987).

Tenn. Code Ann. § 29-20-301 *et seq.* (1980).

Tex. Civ. Prac. & Rem. Code Ann. § 101.101 (Vernon 1986).

Utah Code Ann. § 63-30-111 (1986 & Supp. 1987).

Vt. Stat. Ann. tit. 19, § 1373 (1975 & Supp. 1986).

Va. Code Ann. § 8.01.195.6 (1984 & Supp. 1986).

Wash. Rev. Code Ann. § 35.31.020 (1960 & Supp. 1987).

Wis. Stat. Ann. § 893.80 (West 1983 & Supp. 1986).

Wyo. Stat. § 1-39-113 (1977 & Supp. 1987).

Four other States apply special statutes of limitation to claims made against government entities:

Miss. Code Ann. § 11-46-1 *et seq.* (Supp. 1987).

N.D. Cent. Code § 32-12.1-10 (1976 & Supp. 1987).

Ohio Rev. Code Ann. § 2743.16 (Baldwin Supp. 1986).

W.Va. Code § 29-12-A-1 *et seq.* (1986 Supp.).

Notice-of-claim provisions have been the focus of much recent legislative scrutiny. Legislatures in at least twenty States have reconsidered their notice-of-claim provisions in the last ten years,[1] yet the provisions have been repealed in only two States.[2] In some cases a single State has made repeated amendments to its statute.[3]

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[1] Arizona, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Maryland, Massachusetts, Nebraska, New Hampshire, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wyoming.

[2] Illinois and Kansas.

[3] See, *e.g.*, Tex. Rev. Civ. Stat. Ann. art. 6252-19, § 16 (Vernon Supp. 1985) (repealed, subject matter now found at Tex. Civ. Prac. & Rem. Code Ann. § 101.101 (Vernon 1986)), amended prior to repeal in 1971, 1973, 1983; N.H. Rev. Stat. Ann. § 541-B:16 (1974 & Supp. 1986) (added in 1977, amended in 1985).